EXHIBIT A

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

10X GENOMICS, INC.,	:	CIVIL ACTION
Plaintiff,	:	
vs.	:	
CELSEE, INC.,	:	
Defendant.	:	NO. 19-00862-CFC-SRF

- - -

Wilmington, Delaware
Thursday, November 5, 2020
9:30 o'clock, a.m.
***Telephone conference

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

APPEARANCES:

RICHARDS, LAYTON & FINGER
BY: JASON J. RAWNSLEY, ESQ. and
FREDERICK L. COTTRELL III, ESQ.

-and-

APPEARANCES (Continued):

DURIE TANGRI
BY: DARALYN J. DURIE, ESQ.
EUGENE NOVIKOV, ESQ. and
DAVID F. McGOWAN, ESQ.
(San Francisco, California)

Counsel for Plaintiff

FARNAN LLP
BY: BRIAN E. FARNAN, ESQ.

-and-

FOLEY HOAG LLP
BY: BARBARA A. FIACCO, ESQ. and
JEREMY A. YOUNKIN, ESQ.
(Boston, Massachusetts)

Counsel for Defendant

- - -

P R O C E E D I N G S

(The following telephone conference began at 9:30 a.m.)

THE COURT: All right. Can I have a roll call? Let's hear from plaintiffs, please.

MR. RAWNSLEY: Good morning, Your Honor. This is Jason Rawnsley of Richards Layton & Finger, and I'm also joined by Fred Cottrell from Richards Layton for the plaintiff.

Today we're joined by Dave McGowan, Daralyn Durie and Gene Novikov of Durie Tangri, and with the Court's permission, Mr. McGowan will be presenting the argument.

THE COURT: Okay. Thank you very much. How about from defendant?

MR. FARNAN: Good morning, Your Honor. Brian Farnan on behalf of the defendant, and with me is Barbara Fiacco and Jeremy Younkin from Foley Hoag, and Mr. Younkin will be addressing the Court.

THE COURT: All right. Very good.

Before we begin, let me just give you some -- why I decided to have a call on this.

First of all, I think it's a very interesting

issue, and by issue, I mean the common interest issue. But I'm very concerned this is really not teed up. I mean, I think that that issue is complicated. I don't think there's any binding precedent, and it just doesn't seem to be teed up in a way that would permit me to make a really informed decision about the scope of the common interest exception under these facts. That is one issue.

The second issue is the way it was teed up, I find it very confusing, because on one hand, the defendants have expressly stated in their letter to the Magistrate that they didn't want any attorney impressions. Basically, in the footnote, as far as I'm concerned, they're basically saying we don't want work product and yet they seem to be pursuing work product.

And there's a footnote from 10X in its papers where it does raise a relevance objection, but I don't know that there was any kind of briefing or consideration in front of the Magistrate about proportionality and relevance and burden, so I want to hear about that.

So I think both parties can be guided in their arguments by what I've just shared. And then I would ask at the outset from plaintiff to just tell me the status of things. Was the deponent -- was there, in fact, a second deposition? Where do things stand in terms of discovery in the case generally? And so let's hear first then from the

plaintiff.

MR. McGOWAN: Thank you, Your Honor. This is David McGowan from Durie Tangri. I will try and take the Court's guidance in I think reverse order.

Your first question was, is -- are the plaintiffs seeking mental impressions as opposed to some non-work product material. The distinction that's being drawn that the Court references is between the merger negotiation and between the work product and the types of things that in these cases are considered work product, which would be, for example, an opinion letter from the underlying litigation was at issue in the Hewlett-Packard case, but the distinction is between what were the attorneys in the litigation thinking about and pondering inside their heads and what the parties to the merger negotiations said to each other across the table.

The across-the-table discussions we do not think are work product under Rule 26 or any precedent and they're also not deliberations that are inside the head. They're statements in a negotiation.

If I might proceed stepwise and see if that clarifies the scope for the Court.

THE COURT: Well, so I appreciate -- I mean, frankly, the way you just kind of did it, I mean, that's the way I do it, I think of it. I'm not sure your papers did

that in front of the Magistrate especially because of the footnote you dropped.

And the way I looked at it is you had two depositions. I read the papers last week, so I may get something wrong here. But my recollection is the deposition conducted by Ms. Durie, the questions went to what was put into the data room, into the virtual data room. Is that right?

MR. McGOWAN: The question, the specific question that was teed up is what were the considerations that went to the holdback number with respect to the instruction that they're citing.

THE COURT: Okay.

MR. McGOWAN: So there are two different questions, the Court is exactly right. And we are proceeding in view of that distinction, I think, in Exhibit D, Mr. Starks' deposition, the question that led to the instruction the defendant cites in its footnote, in its papers to this Court, that what were the considerations that led to the holdback number and there was an objection on work product and privilege ground.

THE COURT: Right.

MR. McGOWAN: In a subsequent corporate witness deposition of Mr. LaPointe, the questioning was drawn specifically to conversation, and when that question was

withdrawn specifically to conversations, there was not a work product objection. There was an objection based on, quote unquote, "common interest privilege," which doesn't exist in our view as a standalone privilege.

There are two depositions. There are two different framings of the question.

THE COURT: Yes. Let's go to the first, the first one, because -- hold on a second. Give me a second. All right.

And this conversation points to why I've got concerns about the way the issue was teed up. So I'm looking right now at document 204-1, which is the transcript of the deposition that Ms. Durie conducted, and at page 287, there's a question.

And these -- incidentally, these questions and these responses were cited by you in your briefing. And so the first question is found at line 16 of 287.

Question: So can you tell me, do you know, Mr. Stark, what information Celsee provided Bio-Rad about the 10X litigation in the virtual data room?

And Mr. Younkin said, that's a yes or no. You can answer that question.

And so the witness answered. Actually, the witness asked for some kind of repetition. And then if you turn to page 288, the question is repeated. The witness

said, I believe I do, yes.

Then the question is: What information did Celsee provide?

Mr. Younkin at that point objected: I'm going to instruct the witness not to answer the question on the grounds that it calls for work product protection material. All right.

Then Ms. Durie asked: Did Celsee provide information Bio-Rad about the 10X litigation outside of the virtual data room, and then again, there's an objection.

Now, this time Mr. Younkin says: I'm going to instruct the witness not to answer that question as phrased on the ground that it calls for privileged and work product information.

So then if you go to the next page, page 289, the question that again where we have an objection is, the question is: Did Celsee provide any information Bio-Rad about the 10X litigation outside the virtual data room between the time the letter of intent, the non-binding letter of intent was signed and the time the parties entered into the ultimate transaction?

The witness was permitted to answer that question initially, and then though there was an objection, and the objection was for both privilege and for work product.

So in there, this witness I do see, the way I look at it is, there are two things now at issue with this witness. One is questions that are being addressed about the contents of the virtual data room, there's a work product objection. Questions that are addressed by the negotiations between the two parties, it looks at the very least it's privileged and perhaps it's also work product.

Then later on there's a question I think you're talking about, which says, did the parties -- this is on page 291 -- did the parties discuss in connection with negotiating this non-binding letter of intent whether the escrow holdback would include some for the 10X litigation?

And then on that one, there's a work product objection, not a privilege question, a work product question, and that's found at lines 19 to 22.

Then the next -- well, that's it, I think. Right? So that's the first deposition.

So as I understand the objections for that deposition, there are really two issues. One is, what's put in the virtual data room and that's a work product objection. And then the second one is conversations between the two parties, and there's a, it looks like I will give you the benefit of the doubt, an attorney/client privilege objection and a work product objection.

All right. Now, in your papers before the

Magistrate you say, we don't want any work product. I mean, you say you don't want any attorney impressions. That, to me, I'm treating synonymous with you don't want work product.

So what is it, you know, that you really want, I mean, when I look at that?

MR. McGOWAN: So the note in the submission to the Magistrate indicated that we're not trying to delve into their files, which was a reference to the kind of material that is discussed in the Hewlett-Packard case, which is something that's created to the litigation, may have been transferred, but which exists on a standalone basis as a work product doctrine. That would correspond possibly, because we don't know the contents, to something that would have been put in the data room, but it exists independently of the conversations and the negotiation. It sits there and maybe somebody looks at it. Maybe they don't.

It's not something that is said back and forth verbally or exchanged back and forth in an e-mail as a counter-proposal or something like that.

But I do believe that distinction tracks. The 30(b)(6) witness on this topic, Mr. LaPointe, which is in Exhibit B, and the instruction there is somewhat different as the scope was more highly drawn.

And I apologize, Your Honor. When you were just

reading the second excerpt that you were reading, I missed the page number you were on. The portion that I was referring to was on page 298, 3 to 14, which is what defendant cited in its submission to this Court. My apologies.

THE COURT: Right. 298.

MR. McGOWAN: Eight to 14. My apologies.

THE COURT: And that is a specific question. It's another one. I didn't read that one, but that's another one. What were the considerations that led you to the [redacted] number, and there's an objection. Don't answer because it calls for the disclosure of privileged and work product information.

MR. McGOWAN: That's the, that's the reference, it's my recollection, that defendant cited in its submission to this Court saying that the defendant did instruct on work product grounds.

We then have the 30(b)(6) deposition --

THE COURT: But this is my point. You say you cite that to me. What did you cite to the Magistrate?

MR. McGOWAN: To the Magistrate, we did not understand that they were taking the position that the negotiations themselves are work product because the instruction to the corporate witness was the common interest instruction with respect to discussions.

What we tried to do with the Magistrate is narrow this down somewhat. We're trying to narrow it down somewhat here so that we present a cleaner issue in an effort to actually tee it up than is sometimes presented in the cases where you have underlying work product doctrine material.

So what we presented to the Magistrate was an effort to get at the back and forth, so I don't know if that's responsive to your question. What we're focusing on both here and before the Magistrate is the communications themselves. So if the Court's question is, where is the argument to the Magistrate, it would be in the transcript before the Magistrate at page 27.

And --

THE COURT: Well, wait. Well, let's go to your letter, because you've got to tee this up in your letter. So where is it in the letter?

MR. McGOWAN: I mean --

THE COURT: And the reason I'm getting at all of this because, see, I think this is a really important issue. Right? It deals with privilege. I don't think it was teed up really cleanly, and I'm not faulting anybody because there were a lot of discovery issues and it's in the middle of a deposition. And I mean, frankly, the fact that it was the third issue is my recollection in the letter, it was

almost like it didn't seem this was the most pressing issue and yet I don't want to rush into a very important decision about privilege and work product when it really hasn't been teed up.

And then, and I think you are cleaning up things now, and, again, I'm not necessarily faulting for that, to try to make it like it's, you know, a narrow issue. But, see, then that's why I want you to get back to the practical issue, which I asked you to open up with. Where are things, because, you know, it's almost like we should just present this anew, and therefore it's important for me to think about proportionality issues, burden, probative value of the information being sought, and so that's why I want to know, where do things stand? Did you, after the Magistrate ruled, was there another deposition of any witness?

MS. DURIE: Your Honor, this is Daralyn Durie. May I address that issue?

THE COURT: Sure.

MS. DURIE: Your Your Honor, so we did take a second deposition of Mr. Stark. It was extremely abbreviated and there were literally a handful of questions that Celsee permitted, but we were not able to get any further information from Mr. Stark on this topic. The only information that he provided was the identity of the lawyers whose analysis had been referenced in the investor letter

and that was that.

THE COURT: Okay.

MS. DURIE: So from our perspective, this does remain very much a live and important issue.

THE COURT: All right. And where does the case stand? See, this all became an issue right at the very end of fact discovery, or you tell me. When did it come up in terms of the case schedule and where do things stand with the case schedule?

MS. DURIE: It did come up towards the end of fact discovery and we are now in the process of submitting expert reports.

THE COURT: All right. So fact discovery is over?

MS. DURIE: It is.

THE COURT: All right. You're in the middle of expert discovery. Do we have a trial date?

MS. DURIE: We do, Your Honor. The trial date -- go ahead.

MR. McGOWAN: I didn't mean to interrupt. We do have a trial date, Your Honor, yes. It's June 14th.

THE COURT: June 14th of next year. Okay. When are summary judgment motions due?

MR. McGOWAN: February 5th, Your Honor.

THE COURT: All right. What do you hope to get

from Mr. Stark? Give me some examples of the information that you think you could get if there were no objections and explain to me its probative value.

MR. McGOWAN: Okay. Your Honor, this is Dave McGowan again. I can respond to that.

If I may just note for the record, the answer to the question that you asked, where was it raised in the submission to the Magistrate, is at page 3 of the letter where both the Stark and LaPointe transcripts are cited in limited portion that we referenced.

THE COURT: Okay. Hold up, hold up. It's page 3 of the letter?

MR. McGOWAN: Page 3.

THE COURT: Right. And you say, you just broadly say -- basically, you went through what I cited, which is the 287 to 291, 295 to 296, and then the one we just covered, 298 to 299. Correct? And then you also point to the LaPointe transcript at 55, 56 and page 59. Correct?

MR. McGOWAN: Yes. The LaPointe transcript is the distinction I was drawing earlier. The LaPointe transcript is drawn to conversations and the assertion at those pages is common interest.

THE COURT: And I read that. I agree that that was teed up. Okay.

MR. McGOWAN: In answer to the Court's question with respect to relevance and probative value, the communications between the two parties regarding the litigation are relevant to the issues certainly of infringement, damages, in the sense that what the buyer in these cases is asking is, what's going on in this case? How do I think about it?

Now, this is just a stock acquisition. This is not one of the cases where the buyer is getting a division, they're going to keep selling the product and wind up being a joint, joint defendant, which is what all the other cases are like, and it is a not a successor liability case as far as the defendants are arguing.

But what they are asking is, tell us how right we should be about this, how right do you think we should be, and the buyer and the seller are going to have different takes on that presumably, but they are going to talk about the underlying merits from a business point of view in the sense that they are going to translate the business practices of the defendant in the dollar terms based on whether the defendant is practicing the patent, the kind of information that is relevant to the Georgia-Pacific factors, how important is this business, what kind of a holdback do we need to cover ourselves, what implications does this have.

When you go through the Georgia-Pacific factors, a lot of them are about the competitive position of the business team, the value of the invention. In essence, how significant is this.

THE COURT: Can I stop you for a second?

MR. McGOWAN: Yes.

THE COURT: So, all right. So you are telling me that these negotiations occur when?

MR. McGOWAN: These negotiations are in 2019.

THE COURT: All right. And what is the time frame that I'm supposed to consider in applying the Georgia-Pacific factors to ascertain damages or what a jury would be instructed to consider? What is the time frame?

MR. McGOWAN: So you're going to look at it on the eve of first infringement typically subject to the Book of Wisdom, which means that sometimes you can do a lookback.

To the extent that the negotiations are addressing --

THE COURT: I'm not a patent lawyer.

MR. McGOWAN: Sorry.

THE COURT: I'm thinking Bible when you say Book of Wisdom, so I don't know what that means and I don't know what the clause you said afterwards. But, you know, I don't have your expertise, so I have to go back to, so the

negotiations that we're talking about are occurring in 2019. Do you have a month?

MR. McGOWAN: August is my recollection.

THE COURT: Okay. And then infringement for damages in the patent, this patent case, I'm supposed to look to Exhibit 8 of first infringement. When is that alleged by you to have occurred, or actually by Celsee to have occurred?

MR. McGOWAN: I need to look at it by month.

THE COURT: That's all right.

MS. DURE: Your Honor --

MR. McGOWAN: I misspoke, Your Honor. Negotiation of the letter of intent is December of '19.

THE COURT: December of 2019. Okay. But that's the letter of intent. So beginning December of '19 and extending into what would cover the negotiations?

MR. McGOWAN: So the date range is the case is filed in May. The negotiation of the initial NDA is September of '19. The letter of intent on which the Magistrate relied is December of '19. The business transaction is done, the acquisition is in April of '20.

THE COURT: Okay. Great. All right. So it's going to be some time between December of 2019 and April of 2020 when the conversations about which you would like to learn occurred. Is that correct?

MR. McGOWAN: And if I can go back to the Court's --

THE COURT: Sorry. We didn't hear an answer. I think it might have been a technical thing.

Am I correct, the time frame of the negotiations about which you'd like to discover evidence, those negotiations occurred between December 2019 and April 2020?

MR. McGOWAN: That is correct, Your Honor.

THE COURT: Okay. Sorry. All right. Now, so then let's go back to date of first infringement. What are we looking at? What's the time frame for that?

MR. NOVIKOV: Your Honor, this is Gene Novikov for 10X.

I can answer that quickly as folks try to marshal back. December 8, 2018.

THE COURT: December 8, 2018. Okay. All right.

So then, and forgive me, sir. It's Mr. -- what's your name again, sir?

MR. McGOWAN: McGowan.

THE COURT: McGowan. Sorry.

So, Mr. McGowan, why is it probative what folks are thinking about in 2019, when I'm supposed to be looking at what occurred or at least I'm supposed to be using the time frame as of December 8, 2018?

MR. McGOWAN: Sure. Thank you, Your Honor. And

I apologize for the Book of Wisdom reference. I tried to clarify that. I try to avoid jargon. The Court is quite right, this is a general issue, not a patent specific issue.

To the extent that the business discussions bear on the question of what are the prospective damages from the case, part of that is going to have a liability element. Part of that is going to have a damages element.

The damages element, there should be no difference between what is said in the business discussions and the date of hypothetical negotiation, because the date of hypothetical negotiation is part of the damages input, and to the extent the business discussion and the merger is talking about what do we think that number will be, it's going to be talking about the process of estimating the value of litigation.

So from that point of view, there is no difference between what one would expect the business discussions to be focusing on and the analysis the Court would do in a damages context.

The reference that I made to the Book of Wisdom refers to the Supreme Court case and some District Court cases that indicate that in some circumstances, if there's relevant information during a period of time after the hypothetical negotiation, that can be taken into account as

well. It is not prohibited. It is true that under the Georgia-Pacific factors, typically look at the date of first infringement. There's not a flat prohibition on considering subsequent evidence, and sometimes that happens. And, for example, people are looking at changing the business practices, which one would expect to be part of an acquisition negotiation as well.

So --

THE COURT: Okay. Sorry. Let me just push you back though. Let's assume there were no negotiations. Right? I'm going to go back, or the jury is going to be asked to go back to December 8, 2018, and consider the Georgia-Pacific factors. Right?

Now, do the Georgia-Pacific factors include anything about the trial judge's proclivities or a philosophical approach to patent cases and damages?

MR. McGOWAN: Ideally, they certainly don't say that, and one would expect that that is not something a juror would be instructed on.

THE COURT: Okay. Do they consider the quality of the lawyers that are engaged in the patent lawsuit that's before them?

MR. McGOWAN: The Georgia-Pacific factors don't. I don't know if the Court is asking me two questions. The jurors -- I think that would be up to them.

THE COURT: Well, okay. That's fair because it's a pretty bad question.

My point is that we don't ask jurors, and, in fact, I think the law would preclude us from asking jurors in deciding whether damages should be awarded and how much damages should be awarded to consider all of the things that lawyers consider when they evaluate a case, right, which would include things like the quality of the judge or the philosophy or proclivities of the judge, whether the jurisdiction is a plaintiff or defendant-friendly jurisdiction, how good the lawyers are, how much time has been spent in developing the case, all of these kind of legal strategic things. Right?

You would agree that that is what really goes into or at least it plays a prominent role in any assessment of the value of a case. Right?

MR. McGOWAN: I think with respect, Your Honor, I would provide qualified agreement. I think that might reflect the litigation side, but I would not presume, and certainly I don't think there has been a proffer to this effect, that that is what the business discussions are about, because the business discussions from the buyer's side are, we're going to buy the stock of this company. We see there's litigation out there and we need to pick a number to protect ourselves.

It would surprise me, quite candidly, if the only thing the businesspeople talked about were things that business lawyers don't do day to day, which is proclivities of judges, this and that.

I certainly would not assume that the discussions that are the subject of the present motion would exclusively bear on specific factors unrelated to the business of the defendant, the infringement of the defendant and the economic consequences of that infringement. It would surprise me if there were only litigation tactics discussed in a merger where you've got corporate people talking to each other. If that's the testimony, then that would be the testimony, but we don't know that and I don't think we can assume it.

THE COURT: All right. Now, this is a stock acquisition. Right? You mentioned that?

MR. McGOWAN: That's what the letter of intent states.

THE COURT: What was the ultimate transaction? In what form did it take? How was it structured?

MR. McGOWAN: I don't have the answer to that question at my fingertips. I believe it was consistent throughout, but I need to look that up.

So --

THE COURT: So you don't know if it was a stock

acquisition or a merger, or we just don't know. All we know is that at the time of the negotiation, Bio-Rad wanted to buy stock. Right?

MR. McGOWAN: At the time of the letter of intent on which the Magistrate relied, the letter of intent recites a stock date.

THE COURT: Right.

MR. McGOWAN: And I have nothing to contradict that.

THE COURT: And I might have overstated it. Right? It's not that -- I mean, it's probably more precise to say Bio-Rad was interested in purchasing stock.

MR. McGOWAN: Correct. It is a nonbinding letter on the system, and in our view, that distinguishes it from most of, on whole of the common interest case law, which there found to be a common interest.

THE COURT: Right. So I go back to understand how exactly this was presented to the Magistrate or how it ought to be presented today. You know, in footnote 3 you write, 10X is not seeking attorney files or mental impression, but rather information concerning the negotiation of the agreement between counterparties, but then the questions you cite, at least a lot of them, go to the content of the virtual data room.

So maybe, I mean, is it fair to say that really,

you're not pursuing, you don't need to know what's in the data room? All you want to know is what was said across the table?

MR. McGOWAN: What we're pursuing in this submission is the across-the-table communications. That would be for the e-mails.

THE COURT: And you had an agreement, I think, right, that there would be no logging of documents that postdate the beginning of the litigation. Is that right?

MR. McGOWAN: That is correct.

THE COURT: And you want what? A 30(b)(6) witness to come in and just answer questions about what was said to Bio-Rad during the negotiation. That's, at the end of the day, what you want. Is that fair?

MR. McGOWAN: Fair. Yes, Your Honor.

THE COURT: All right. Anything else you want to bring to my attention?

MR. McGOWAN: The only point that I'd like to make is that I believe that this can be done simply on the law just by looking at Rule 26, because in our view, the across-the-table communications and work product in the first instance.

THE COURT: Wait, we had a technical glitch. Can you repeat that because I don't know what you said between privilege and work product, so can you just start?

MR. McGOWAN: Sure.

THE COURT: What did you say? We can resolve by looking at Rule 26 because what?

MR. McGOWAN: Because we don't believe the across-the-table communications are work product in the first instance, and we believe the Magistrate treated them as being work product.

THE COURT: Well, I mean, look, and this may be -- I mean, they could be work product to the extent if somebody from 10X said, my lawyer told me X, Y and Z because she thought blank because she thought A, B and C, I mean, that's work product. Right? It's communicating work product. You would argue it's waiving it, but the point is, it is conveying the mental impression.

MR. McGOWAN: Right.

THE COURT: And you said you're not interested in getting those. So that's why you, you know, say you're not seeking attorney mental impressions, so it seems to me based on that footnote, you shouldn't get to get work product even if it were weighed during the negotiation.

MR. McGOWAN: And I apologize if it's unclear. I think that if a statement is made across the table, that's, A, not work product; and, B, if there were work product, it would be waiver, and we can talk about the Philippines case and selective waiver and all the rest.

What we're trying to indicate in that footnote is, we're not trying to dive down into the underlying documents and the litigation files. We're trying to distinguish what we're asking for in the Hewlett-Packard case, Sealed Air case, where they are trying to go down into the litigation files. We're trying to stay across the table.

If across the table a lawyer or a businessperson in a corporate setting recites something, then that recitation is not work product, and it's strictly a waiver analysis, we think the error that we want to draw to the Court's attention is in treating those statements themselves as work product.

I believe the law on waiver would establish that the communication constitutes a waiver because we don't have the facts that were put within the common interest stock, but the distinction we're trying to draw is between litigation files and across the table, and I apologize if I was not clear on that point.

THE COURT: Well, that's all right. But, see, you know, the thing is, work product, it's a different test whether work product has been waived. And would you agree that at least there are circumstances where an NDA -- let me start again.

There are circumstances where parties share

attorney impressions pursuant to an NDA and there would be no waiver because under Westinghouse, they did take appropriate measures to try to guard the secrecy of that and limit the distribution of that work product?

MR. McGOWAN: I think that the answer to Your Honor's question is a qualified yes. The qualification comes from the requirement in the common interest cases that there be a common legal interest as this Court said, in the Dow chemical case, such as co-defendants or anticipation of joint litigation.

Just for the record, I think that the rule on this is stated in the Philippines case, the Republic of the Philippines case at page 1429, where the Court says, a party who discloses documents protected by the work product doctrine may continue to assert the document's protection only when the disclosure furthers the doctrine's underlying goal.

I agree that work product and privilege have some different aspects. The purpose of work product is to prepare for trial. Rule 26 says, in anticipation of litigation or for use at trial.

It is not anything that happens because litigation is out there. It's not the case that if I have to rent extra office space in order to accommodate the files of the case, that the lease agreement becomes work product

and is subjectively the reason I did it is because of the litigation. It's a purpose driven doctrine, and the point is whether the communication in question furthers the purpose of the doctrine.

In the Hewlett-Packard case and the other common interest cases in Maine, disclosures are found within a common interest when there is a common interest such as being joint defendants, and the disclosure relates to that interest.

THE COURT: Right. Now, on this though, let me just stop you, because you didn't argue any of this to the Magistrate. Right?

MR. McGOWAN: I think that before the Magistrate, I think that what we did is argue that -- we argued the instruction we got. We did not understand at the time that they were going to claim that, the defendant was going to claim that the negotiations were themselves work product, so what we argued was the common interest point.

THE COURT: Right. But, see, in fairness to them, I know you apologized for it. You don't need to apologize, but you have.

I mean, I go back to how you presented it in footnote 3. You said you're not seeking attorney files or mental impression, and that's why I began the conversation by just talking about dissatisfaction on my part in the way

the thing was teed up. I'm not faulting anybody, but just that's the reality. And a lot of the questions in the first deposition were really designed to find out what was in the data room, and I could see in the data room there being what would normally be called work product, like opinions of counsel about validity or invalidity of patents, things like that.

MR. McGOWAN: Sure.

THE COURT: But I'm just going to tell you right now, I mean, I think you've waived your right to pursue that because of the footnote, the content of the footnote says it, and it sounds like you're not pursuing the data room documents anyway. So I think that I'm just going to go ahead and say that's the way I am going to rule, that you have -- by footnote 3, you waived your right, or at least you didn't tee up, and it's too late to do so now, to find out or obtain documents that would reflect the mental impressions of attorneys.

And, furthermore, it sounds like this morning you're saying you are not even pursuing documents from the data room at this point. You want to limit the scope of your discovery requests to oral and e-mail communications between the parties between December 2019 and April of 2020. Is that right?

MR. McGOWAN: Yes. And just to go back to the

point you just made, it was at the end of footnote 3 where we say we're not seeking mental impressions, but information concerning the negotiation of the agreement. What we're doing, in fairness, I think is consistent with the negotiations point even in that footnote.

THE COURT: Well, but I raised it because I think it explains why -- you know, you say you didn't raise these, this issue of Westinghouse or what's the purpose of the disclosure. You're faulting 10X. I'm sorry. You're faulting Celsee, and I'm not finding that very persuasive. It sounds like you have raised cases in the first instance before me that weren't addressed to the Magistrate.

MR. McGOWAN: May I have one brief response to that, Your Honor?

THE COURT: Sure. Go ahead.

MR. McGOWAN: As I said before, when we were going through exhibits, Exhibit G, by focusing on communication, we were focusing on the line of inquiry where the objection was straightforwardly common interest. I don't think that there was any effort made at any point in time to establish that a negotiating statement is a work product statement, but the briefing before the Magistrate focused on the question whether there was a common interest, and we discussed the Hewlett-Packard cases on most of those. But I don't believe there was ever any effort to establish

that the communications were themselves work product. The objection of the 30(b)(6) deposition, a common interest privilege.

THE COURT: Well see, I disagree. That's why I read it to you at the outset. I mean 291:

Question: Did the parties discuss in connection with negotiating this nonbinding letter of intent whether that escrow holdback would include some for the 10X litigation?

Mr. Younkin: Instruct the witness not to answer that question on the grounds it calls for work product. That sounds like a work product objection.

MR. McGOWAN: Right, but I was referencing the 30(b) deposition.

THE COURT: Well, okay. All right. But you cited before the Magistrate, and I thought that was -- the discovery issue is related to both depositions.

MR. McGOWAN: It is. The more specific to the communications in the negotiation I think is the 30(b) instruction. That's the point that I'm making.

THE COURT: Okay. All right. We have narrowed it now, I think. We have narrowed it to all you want are oral and e-mail communications between December '19, April 2020, between Celsee and Bio-Rad relating to the escrow and fees, expenses and damages relating to this

case.

MR. McGOWAN: I would say the litigation. I don't know if there are things that are --

THE COURT: Okay.

MR. McGOWAN: -- related to the escrow that are in there, because we don't know what was said yet.

THE COURT: Right.

MR. McGOWAN: A fair summary.

THE COURT: Okay. That's where we are. All right. And you want to also get from that any statements that may have conveyed attorney mental impressions?

MR. McGOWAN: Yes. Anything that was said back and forth, our view is not work product in the first instance, and if it happened to convey work product does not fall within the common interest exception for waiver.

We have not discussed the details of the exception a lot, but it caches out to just what the Court said. If there is a mental impression and an across-the-table statement, our request is that that would have to be disclosed as well. What doesn't need to be disclosed are the things sitting in the files themselves or things just sitting in people's heads that were not stated.

THE COURT: Okay. And then on the merits -- I don't know if it's the right word, but on the common

interest issue, I mean, your position is it's a non-binding letter, the negotiating across the table from each other. It's a stock acquisition, so it's not like Bio-Rad has taken on the defense of this litigation and so the cases that are cited by 10X are inapposite. Is that a fair summary?

MR. McGOWAN: Fair summary, Your Honor. Yes.

THE COURT: Okay. All right. Let me hear from the other side then.

MR. YOUNKIN: Thank you, Your Honor. This is Jeremy Younkin.

I think if I may just at the outset point out that there were really two independent grounds for the Magistrate Judge's decision, and so one of them was the squarely work product.

And so as we have discussed today, 10X stated in their footnote that they were not interested in attorney mental impressions, and then the Judge asked, well, why do you want this information?

And they said, because we think, as we've heard today, that the negotiation is going to reflect the parties' views about the value of this case. And, indeed, I think Mr. McGowan has made it clear, it's their theory this evidence is relevant because, you know, it's going to reflect, you know, quote, "how worried we should be and what are the underlying merits of the action and what are the

potential damages."

And when Magistrate Judge Fallon heard that, she said, I can't think of a clearer example of work product, and then she said, that work product protection was not waived because it is difficult to waive work product. You need to do something that allows your adversary to find out the information, and that was not done here.

Celsee and Bio-Rad were talking to one another under a nondisclosure agreement about an acquisition and there was really no risk that 10X was going to get the information and so work product protection applies and it wasn't waived, full stop. I mean, and that standing alone without even getting into common interest case law provides grounds to affirm Magistrate Judge Fallon's decision and finds --

THE COURT: But I mean I feel bad for Magistrate Judge Fallon because I just think the way it was teed up was kind of unfair to her.

So let's go to the transcript that you've just recited. What page are you on?

MR. McGOWAN: Well, her statements, if you look at the very end on page 38 of the transcript.

THE COURT: Right.

MR. YOUNKIN: She says, in addition, even putting aside the common interest doctrine, so she is taking

that out of the equation, the work product doctrine affords an additional basis for protection of the information that plaintiffs plaintiff seeks to compel.

THE COURT: Right. Now, you know, it's not clear to me. What is she talking about? The information the plaintiff seeks to compel? What's the information the plaintiff seeks to compel that she's referring to?

MR. YOUNKIN: I think what she's referring to are the communications between Bio-Rad and Celsee about this litigation. And so the way that this kind of came up, Your Honor, if you turn to page 28 of the transcript --

THE COURT: Right.

MR. YOUNKIN: Okay?

THE COURT: I'm there.

MR. YOUNKIN: Okay. So this is Mr. Novikov arguing about why he says the negotiations of the escrow provision are not subject to common interest, and I will just point out that Mr. Novikov opened with this argument and so clearly 10X understood --

THE COURT: Sorry, sorry. What line were you on and then start again.

MR. YOUNKIN: Page 28. 28, Line 7.

THE COURT: Okay. All right. Got you. Thanks.

MR. YOUNKIN: Okay. So this is 10X arguing, and they say that their assessments, meaning the Bio-Rad and

Celsee's assessments or representations as part of that back and forth about how much this litigation is worth, and then what financially they view the risk to be is certainly highly relevant to a number of issues. And so Judge Fallon's reaction to that is found on page 36.

THE COURT: Okay.

MR. YOUNKIN: And if we look at line 16 -- sorry, the beginning of that paragraph around line 10, she's talking about these communications. I think there, clearly we're talking about the communications between Celsee and Bio-Rad about the escrow provision.

And then at line 16, she says, these go to the very heart of what the parties think about what this case ending in litigation is worth, and I can't think of a clear example of what might be protected by the work product privilege.

And, indeed, we've heard today that their whole theory of this evidence is that it will reflect each party's mental impressions about this litigation -- the strengths, the weaknesses, the damages. And that sort of evidence is -- it's just product information.

THE COURT: Hold on. I agree with you. All right. So on that statement, I do understand that, and I do think there's no question about it. Then I think we've got an issue about whether there's a waiver of disclosing it.

MR. YOUNKIN: Okay.

THE COURT: And so the way I look at it is that because of footnote 3, that wasn't teed up. In other words, the way I look at it is the footnote 3 -- sorry. Hold on one second.

There it is. In footnote 3, the statement that 10X does not seek an attorney files for mental impression. So as far as I'm concerned, they don't get to get -- they are not asking the Magistrate to force them, to force a disclosure of mental impressions. That wasn't teed up and so I'm going to affirm the Magistrate to the extent that she said that on page 36 that Celsee's evaluation, or, rather, Celsee's attorney's evaluation of the case is quintessential work product, I think that's true. And why I am going to affirm her, I'm not sure this is the reason she made the ruling, but I'm going to affirm it is, you can't in a, what is effect effectively a motion to compel, which is the letter dated September 21, 2020, at DI 204, you can't say you're not seeking attorney files or mental impressions and then expect to get them.

So I don't have to get into whether or not there was a waiver of work product during the course of these negotiations or not because that issue in my mind wasn't properly brought up to the Magistrate, and, in fact, it was essentially -- it was waived, and so I'd affirm her on that

issue.

So now what I think is left though -- well, what's left in the negotiation and the back and forth, okay, where there's not a disclosure by Celsee about the impressions of their attorney as far as valuing the case, but there are negotiations, other statements they made that do not reveal work product.

Now, why shouldn't 10X get that information?

MR. YOUNKIN: Well, I don't think actually that they are seeking that information. I mean, I think --

THE COURT: Well, I mean, I think Mr. McGowan is seeking that information.

Mr. McGowan -- wait. Let me just ask him because I thought it was pretty clear, that's what he wants. He just wants as well any disclosures that included work product.

Mr. McGowan, that's what you are seeking. Right?

MR. McGOWAN: The Court is correct. If it's across the table, it s the subject of our submission to the Court.

THE COURT: Right. But, okay.

MR. YOUNKIN: Okay. But I think we're potentially talking past each other here. I mean, Mr. McGowan's position is anything said across the table he

wants, and I think Your Honor just said, well, if it's work product material, you don't get it.

THE COURT: Correct.

MR. YOUNKIN: And so my -- right.

THE COURT: But there's still a lot of other information. I mean, in other words, a person across the table could say, he could say, I think the case is worth this much, or she could say, I don't know who the 30(b)(6) witness is going to be. She could say, you know, we think the case is worth this much, or she could say -- I mean, she could make revelations about a lot of stuff without disclosing work product.

MR. YOUNKIN: Your Honor, I disagree with that. I think if somebody says I think the case is worth X, that is a disclosure of -- I mean, that's protected by the work product, because that is one party telling the other party its mental impression about the value of the litigation, which is, of course, informed by, as I said, that's clearly a mental impression about the value of the case.

And so --

THE COURT: Hold on. Attorney work product goes to the attorney's mental impression. Now, the client might agree with the attorney or disagree with the attorney, but the client's ultimate mental impression is not the attorney's mental impression.

The other thing is, and I'm sure you're familiar, I mean Upjohn, all the work product cases distinguish between fact and opinion. And so what I want you to focus on now, so this is the issue. I'm basically, I'm not going to allow Celsee to get a disclosure of the mental impressions of 10X's attorneys. Okay? They've waived that by their footnote. So to that extent, I'm affirming the Magistrate.

What remains to be decided is, what about the rest of the negotiation? And I am concerned that the Magistrate Judge read too much into AgroFresh. I'm concerned that AgroFresh and the other cases upon which you rely don't really apply here, and yet I'm also concerned, as I mentioned in my questioning of Mr. McGowan, about how probative is this stuff and is it even wore worth the burden of a deposition.

And, you know, I see where you drop a footnote in your papers in front of me based on relevance, but did you do that in front of the Magistrate? Did you argue proportionality or burden or relevance in front of the Magistrate?

MR. YOUNKIN: I believe that I noted it during the hearing, Your Honor, but really, the way that the issue was teed up was, it was an argument to that privilege instructions given at a deposition were improper, and so

that was their argument, and so we were defending the privilege instruction.

I did note at the hearing that the relevance argument seemed a bit stretched, but certainly, we weren't instructing the witness not to answer a question at a deposition based on relevance grounds.

I do think --

THE COURT: I've got the transcript in front of me, where did you say that or something about burden, relevance, or any considerations, proportionality?

MR. YOUNKIN: Yes. And this may have been -- this may have actually been in connection with the first argument.

Yes. I mean, so to be clear, the statement is that I was referring to is on page 19 and it really is dealing with the first of the two arguments that were before her.

THE COURT: Okay. So the bottom line is, you really didn't argue proportionality or overly burdensome or even relevance as a basis to prevent further deposition of this 30(b)(6) witness. Correct?

MR. YOUNKIN: Not with respect to this argument. That's right.

THE COURT: Okay. So then I think we're stuck. Right? So then I do have to, it looks like, address the

common interest doctrine and whether it applies. Is that fair?

MR. YOUNKIN: I actually don't think that that is correct, Your Honor, because I think that the waiver, the waiver rules around a work product are much more stringent than the waiver rules --

THE COURT: I'm not going to give them work product. I've already said that. You've won that.

MR. YOUNKIN: They don't -- okay. I think there is still an open question about the limits of that though, because, firstly, I do need to say that the work product doctrine does not just protect attorney mental impression. It also protects the mental impressions of a party about litigation, so that's number one.

Number two --

THE COURT: All right. So, wait. Now, this is an example of, unfortunately, you guys are asking me to make a pretty, you know -- there are few things more important than attorney/client privilege and attorney work product.

Do you have a case that says that if I ask a client about the client's mental impressions, that that is prohibited by the attorney work product doctrine?

MR. YOUNKIN: Well, Your Honor, yes. I think that just the plain language of Federal Rule of Civil Procedure 26(b)(3) --

THE COURT: All right. Hold up. Let me pull it up. 26 what?

MR. YOUNKIN: (b)(3).

THE COURT: Okay.

MR. YOUNKIN: Okay. So, and this is Section A.

THE COURT: All right.

MR. YOUNKIN: Which is basically the work product rule. And it says, ordinarily, a party, 10X, may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party, another party, or its representatives, including the party's attorney.

And so a party, you know, a company gets a demand letter or something and the CEO works on it and forms a mental impression about the value of the case. That can clearly be work product. And so when you have --

THE COURT: Well, I didn't say it couldn't be, but --

MR. YOUNKIN: I was just trying to make the point that work product protection is not limited to an attorney's mental impressions, that it also covers a party's mental impressions about a litigation. And here, that's all they want. All they want is a party's mental impressions about this case, and I think Judge Fallon heard that and she said, that's clearly work product. You don't get that.

And, you know, I think in this case, too, I mean, attempting to tease out, you know, even if you were to say, well, okay. Let's try to distinguish the lawyers's mental impressions from the negotiators mental impressions, I mean, I'm not even sure how you could possibly do that, which is why I say, they're only interested in the mental impressions. If the discussions do not reveal or reflect what a party thinks about this case, they don't want them. That's their whole theory of relevance here, which is why I think the Magistrate Judge said, that's what sounds like what you want is work product. You, 10X, have to show waiver of work product and you can't do that because the parties were talking under a nondisclosure agreement and there is no risk that that information would get to 10X. And you can do that just based on the waiver rules around work product without even delving into, you know, Hewlett-Packard and the common interest body of case law. It's just independent grounds of affirmance.

And I do not think --

THE COURT: So let me just ask you this. Let's say Bio-Rad at the last minute said, we're not doing this deal and, or let's say Celsee said we're not doing it and then Bio-Rad sued Celsee. Are you telling me that those negotiations, they would never see the light of day in a Court if there was a dispute over the meaning or, you know,

the way the negotiations went?

MR. YOUNKIN: I don't know the answer to that question, Your Honor. I mean, I think it's possible in that situation that --

THE COURT: Well, it happens all the time. It happens all the time when there's a negotiation that doesn't get consummated or gets consummated and the parties argue about it. As long as parol evidence is admitted, if you have then an ambiguous contract or something, this is the kind of evidence that comes in under the parol evidence rule.

MR. YOUNKIN: Well, the parties -- the parties, of course, are free to waiver work product if they decide to in a litigation, and here, that's not being done. The parties are, you know, making their work product objection.

I also want to make just one point about it seems like Mr. McGowan is drawing this distinction between the documents in the data room, which he, I think, now concedes is off-the-table and communications that were made in a negotiation, but there's no reason to draw a distinction between those two things. It's just, it's just the form of communication.

And so if we all agree that if an opinion of counsel gets put into the data room and there's no waiver, then the same thing should apply if the contents of the

opinion of counsel are disclosed in an oral communication or an e-mail.

THE COURT: I don't think he said that and I don't need to rule on that because I've already said he doesn't get work product. He doesn't get work product because they took the position in footnote 3 that they weren't seeking it. All right.

So the only question is, do they get the communications that went back and forth between the parties. I mean, to me, I mean, I don't think it has huge probative value, but as you said, you didn't make that argument.

Now, the good question is, you know, they're making a new argument, you could argue, so can I just consider now, like what's the relevance of this material? What would be the burden to produce it? But you have not said anything in that regard even though I've asked.

MR. YOUNKIN: Well, I mean, I think that I mean I would point to the footnote that we make in the response to the objection, and I would also say that the circumstances have changed a bit because, you know, where we find ourselves right now is November 5th, the plaintiffs served an opening damages report, so we already have their expert opinion on what she thinks the damages in this case should be, and we're about to serve our rebuttal report on Friday, tomorrow.

And then what they want to do is have a deposition in the next couple of weeks, I guess, that they think is going to uncover evidence that's going to bear on damages, and so then what are we going to do? Supplemental reports, you know, as we head towards summary judgment in February?

I mean, just from a practical standpoint, you know, it's going to be difficult. Like I said --

THE COURT: Have you considered what kind of burden it would take to go review all the different e-mails and communications between 10X and Bio-Rad? You didn't log the material. Right? Have you even conducted a search for the material?

MR. YOUNKIN: I don't, I don't know the answer to that question. You know, these requests, the requests for the Bio-Rad discussions in particular came in pretty late in discovery. We objected to them. There was a little bit of hashing things out. But I mean I think that we have been pretty clear that we weren't going to produce these communications, you know, going way back.

And, really, I mean, the issue really got teed up around this, the deposition as opposed to responses to document requests. But like I said, Your Honor, I think that we still have to address this issue of we all agree that they're not entitled to work product information, but I

think it still leaves open a question, well, what is work product information? And Judge Fallon said, communications about this litigation are covered by the work product doctrine, and that conclusion, we submit, is not clearly erroneous, and 10X has not shown that it was.

They are not asking for communications about, you know, some random provision in this merger agreement. They are asking for communications about the litigation. That's all they care about.

THE COURT: Well, there was no work product objection lodged to the 30(b)(6) witness. Right? It was based solely on the objection on the common interest exception.

MR. YOUNKIN: But the common interest exception, I mean, I don't think that's mutually exclusive of work product. Really, what the common interest exception is saying, the underlying privilege was not waived. And, by the way, the LaPointe deposition happened first, and so they understood kind of what our position was, I think, and if they had any questions about it, they could approach further with Mr. Stark, the witness who is actually involved in the negotiation, and they didn't.

And so they asked him specific questions. You know, what were the considerations that led to this escrow provision? And I was there and I objected to work product

grounds. And as I think you said, it really couldn't have been clearer.

And then in the meet-and-confer, which Mr. McGowan didn't attend, work product was featured. I mean, I was telling Mr. Novikov that I thought that work product prevented him from getting this information. And so they understood this was an issue, which is why they dropped a footnote to address it briefly in their letter.

And then when we got to the argument, Mr. Novikov opened up by arguing that communications about this negotiation, about the negotiation of this merger agreement are not covered by the work product doctrine.

So that was aired, and the Magistrate Judge disagreed and said, no, that those communications are covered by the work product doctrine.

THE COURT: So why don't you explain to me why communications with another party that's trying to buy, is interested in purchasing your stock, why would my communications with that entity constitute work product?

MR. YOUNKIN: Because the content of the communication is a mental impression about the litigation, and so just as a side note here, the deal is being characterized as a stock deal. I mean, this is an acquisition. Right? Bio-Rad bought it. They own it now. It's not just they bought ten percent of the shares or

anything like that. Bio-Rad purchased, acquired, 100 percent of Celsee.

THE COURT: Okay.

MR. YOUNKIN: But so if there's a negotiation happening and under an NDA where a defendant in a lawsuit is talking about somebody who wants to buy them and the defendant says to the potential acquirer, let me tell you my mental impressions about this litigation, okay. So what is being communicated is a mental impression that had been formed in connection with the litigation.

And the disclosure of that mental impression to the other side is not a waiver in the same way that, you know, if you had -- you know, a general counsel sits down and says something like, you know, here are the defenses to this, to this claim, here are the arguments that I think, you know, are good ones that we're making, those are his or her mental impressions. And if you disclose that to a potential acquirer under an NDA, under the very strict rules surrounding waiver, which they had the burden to prove, there is no waiver, and that's what Judge Fallon held and she was correct.

THE COURT: Well, I'm having a hard time. You know, you cite 26(b)(3)(A). I mean, that deals with documents and tangible things. So, A, that is off the table. We're not talking about that. We're talking about

conversations, number one, and then we're talking about e-mails that are sent to Bio-Rad. They are not in anticipation of litigation. I mean, you've got to demonstrate to me why they would be.

I get where it may be within those documents they are conveying what 10X's lawyers thought about the case and they are not getting that. We've already discussed that. So I want us to go back and narrow the scope of what is really being addressed.

Now, I do think it's, you know, it's informative that they are buying all the stock, so they are taking over, they're basically taking over the case, and they are, is it fair to say then they are at least indirectly inheriting the liability in the litigation in your view?

MR. YOUNKIN: I mean, subject to the terms of the merger, which address this.

THE COURT: Okay. What does it address? What does it say?

MR. YOUNKIN: Well, there are -- I mean, there are --

THE COURT: Actually, what does the letter of intent say? Let's focus on that, about what happened to the litigation.

MR. YOUNKIN: The letter of intent says that Bio-Rad will acquire a hundred percent of Celsee, and then

it goes through some of the money payments. I do not believe that it talks about -- you know, then it says we're going to do due diligence and it doesn't mention the litigation, I don't think, just looking at it quickly, expressly.

The merger agreements does contain provisions that squarely address the litigation, including how it's going to be paid for, and those are, those are the provisions that 10X wants discovery on.

But, again, if you have -- let's just say you have two businesspeople sitting across the table from each other and one businessperson says, as Mr. McGowan asked, how worried should we be? How could that question possibly be answered without revealing the attorney's mental impression?

THE COURT: Very easily. You just don't disclose what your attorney said to you or wrote to you.

MR. YOUNKIN: But the negotiators, the negotiators's view on that is inextricably tied to what his lawyers are telling him. A businessperson is not an independent view of the potential liability separate and apart from information that has been given to him by lawyers. No way is he forming a judgment about that.

THE COURT: Well, I don't find that argument very compelling.

So, Mr. McGowan, here's where I am. It just

strikes me that I don't see how I would let into evidence in front of a jury any statements that were made during the course of the negotiations, because I think if I applied Rule 403, I would conclude that the probative value here would be substantially outweighed by a number of considerations. I think it would confuse the jury and potentially mislead the jury because I don't think any of the statements that might have been made during the negotiation with respect to the value of the litigation or potential damages award, I don't think that it would be -- it would be fair or proper to have the jury try to parse, well, how much of that is based on things that the jury should never think about, some of the legal strategies and assessments about juries, about judges. I just think it would -- and I think the probative value is limited.

Now, I have not heard anything about burden from 10X, but I really just question why we need to have teed up --

MR. McGOWAN: May I respond, Your Honor?

THE COURT: Yes. Sorry. I was hoping you would. Thanks.

MR. McGOWAN: I just wasn't sure if the Court was concluded.

Let me suggest that a 403 ruling usually has the benefit of the proffered testimony, so there's something

concrete to rule on. Part of the discussion we've just been having is hypothesizing what the testimony might be, and if Bio-Rad comes in and makes its own statement, that's what we've looked at. Says, yes, we've got a problem there. It feels very different from the kind of hypotheses that 10X's counsel was just making.

I think the way to cut through all of this is to actually adduce the testimony respecting the Court's work product, the way the Court has ruled, but the Court I think is correct, that that is not everything. And I agree that back and forth across the table in a merger in a hundred percent stock acquisition, I don't think that makes a difference in the common interest doctrine. But I think that kind of evidence comes in all the time. I don't think there's a plausible work product decision there.

So I think the way to cut through this is to respect the Court's ruling that it has made on work product, recognized that there was some residuum, then find out what it is and then have a concrete piece of testimony or a concrete question that can be addressed. That's what I would suggest.

I feel as though making assumptions about what might be the case is not a good way to resolve the question of admissibility or a question of burden when that hasn't really even been briefed.

And --

THE COURT: Well, I said, I used the conditional language when I said it, and I said it with the hope that you might think the odds of it coming in are so minimal, that you wouldn't pursue it. But you are not willing to do that, and I'm not making a definitive 403 judgment because I don't have something specific in front of me. I was just sharing with you my general thought process based on your explanation of how this information you hoped to get would be probative. It is just I didn't find it really, really compelling.

MR. McGOWAN: Sure. If I can just -- let me just -- I don't want to dwell too much in hypotheticals, but the Court alluded earlier to the idea that, well, maybe Bio-Rad makes a comment that is not -- and a Celsee person agree with it.

THE COURT: Wait. You broke off again. You said Bio-Rad makes a comment and then I lost you.

MR. McGOWAN: And then a Celsee person agrees with it and says, yes, that's true. That could be a liability issue, not a damages issue. That's a response to a comment. That's not work product in any respect.

Now, what the Court would do with that, would think about that in a 403 context would depend, I think, on the question, and the Court would have something concrete to

look at. But I really feel as though with respect to the Magistrate's ruling, that the premise that the non-mental impressions across the table testimony is not work product, I think that's a matter of law. I don't think there was any foundation laid to show that it's work product and I don't think there has been any laid here.

So I think that ruling was incorrect with respect to the traunch of communications the Court has identified this morning.

Then the question becomes, if I take the Court's point to be is the game worth the candle with respect to that bit of information. We're looking at a June trial date. I don't think this -- I have not heard a reason why this should take a huge amount of time, but I think that in order to follow the legal rules of work product and admissibility, we really need to see what the evidence is so concrete decisions can be made.

MR. YOUNKIN: If I can respond to that?

THE COURT: Yes. Sure. Go ahead.

MR. YOUNKIN: I mean, you know, Courts make relevance calls all the time before we know what the answer is. That's what -- I mean, when you are ruling on a motion to compel a document request, the question is, you know, what is the question? What are the documents you are seeking and are those relevant? Can you show that they're

relevant?

And, you know, and prejudice and burden can play a role in that as well. I mean, here, we're here on a motion to compel answers to questions that were asked at a deposition. This shouldn't be, you know, open up, have a whole deposition. They should come in here and say, point to the transcript. Here's the question I asked. It was blocked. I would like an answer to that question.

And I don't think that Mr. McGowan can point to any questions that were asked where, you know, he feels like he needs the answer in order to make an argument that, you know, that passes 403 muster.

MR. McGOWAN: May I respond, Your Honor?

THE COURT: Sure.

MR. McGOWAN: The instruction given in Exhibit G, the corporate deposition, was a categorical instruction.

MR. YOUNKIN: That issue has been waived. I mean, what they asked Magistrate Judge Fallon for was a deposition of Mr. Stark. They did not ask for a new 30(b)(6). They didn't ask for Mr. LaPointe to reappear. They said, this is in --

THE COURT: All right. So, hold on. This is the first, you know, that somebody has said that to me. Maybe it's in the papers, but this is -- again, I go back

to, it just wasn't really presented, at least something that I would grasp immediately. So hold on.

So the pending motion is solely to redepose Mr. Stark. Is that right?

MR. YOUNKIN: Yes. Footnote 1 in their letter brief to the Magistrate Judge.

THE COURT: All right. Hold up. Well, this is made in the context of another argument.

MR. YOUNKIN: Well, the proposed order is to produce Mr. Stark to provide deposition testimony as a corporate representative. I mean, Mr. Stark wasn't our corporate representative on any topic. He is a former employee.

THE COURT: Okay. So, you know, now I'm looking at it, it does say, Celsee should be compelled to reproduce Mr. Stark to testify as its corporate representative concerning the negotiation of the merger agreement. I mean, that's a 30(b)(6) witness. They want Mr. Stark to be the witness because they think he's probably most knowledgeable, but I mean, they're asking for a 30(b)(6) witness. They just want it to be Mr. Stark. That's on page 3 of your letter, DI 204. I don't think they've waived their right to have a 30(b)(6) witness given that language.

Okay. Anything else anybody wants to bring to my attention?

MR. YOUNKIN: I mean, we've been going for awhile, Your Honor, so I don't want to belabor the point. I will just say though that I think you have really focused on this one prong of the Magistrate Judge's decision, which I think is fully sufficient to affirm, which is the no waiver of work product, but there is a separate and independent ground around the common interest doctrine, and I think that what, you know, what 10X is trying to do here, you know, and I think that they've been pretty candid about it, is basically get this Court to rule for the first time in Delaware at the Third Circuit that you cannot have a common interest when you're in merger talks. A common interest doctrine simply doesn't apply there.

THE COURT: No. So I don't view it that broadly. I mean, frankly, I would prefer not to opine, period, because I don't think -- because of the manner in which the issues were brought to me and brought to the Magistrate. But I don't think they're asking for as broad a ruling as you just said. Am I correct?

MR. YOUNKIN: At the hearing they told the Magistrate Judge -- I mean, their position is that Hewlett-Packard was wrongly decided and that it should no longer be followed. And the Magistrate Judge says, well, if I agree with you, is this going to (inaudible) privilege whenever there's a merger?

And they candidly said, yes, they would like the District of Delaware to say that Hewlett-Packard was wrongly decided and it's not the law in Delaware. And so that when parties -- and they would like the Court to follow, you know, other cases, like out of Illinois that say that when parties are in a merger negotiation, there's no common interest.

It's just not the law in the Third Circuit. I mean, the Sealed Air case rejected that, rejected that argument squarely and then there's a Bankruptcy Court in Delaware that did the same.

And so I think that they are candidly saying that they would like, that they would like Your Honor to rule that Hewlett-Packard is not the law of Delaware and that that line of cases --

THE COURT: First of all, when you say that the law -- so actually, this gives me a perfect example. In fact, I'm glad. I forgot to raise this and I really should have at the outset, but it's a perfect example of why I mean this is not teed up for me. And let me ask Mr. McGowan first.

Mr. McGowan, are you there?

MR. McGOWAN: I'm here.

THE COURT: So what law of privilege should guide, should I follow?

MR. McGOWAN: To the extent that -- Rule 26 is the answer to the Court's question. To the extent the common interest doctrine has been recognized and we're dealing with a federal question case, then I think on work product, it's always Rule 26.

THE COURT: Wait, wait, wait. So hold on. We're not dealing with work product. I already ruled on work product.

MR. McGOWAN: Right.

THE COURT: So we are only dealing with privilege. All right? So what rule applies?

MR. McGOWAN: Okay. I apologize. When the Court said privilege, so the rules that the Court would be bound by I believe would be Third Circuit.

The rule --

THE COURT: When you say -- wait. When you say rule of the Third Circuit, so when the Third Circuit addresses a privilege, doesn't it look to the state law, the state law privilege that's relevant?

MR. YOUNKIN: So it depends on the basis for jurisdiction in my view, Your Honor.

So in a diversity case, for example, attorney/client privilege with respect to causes of action grounded in state law would be governed by state law. With respect to work product, state law is not relevant because

it's a rule of civil procedure, and under the Erie doctrine, the Federal Rules govern.

THE COURT: But we're not dealing with work product. Right? I only have a brain, I've got a limited brain. I'm not as smart as you guys. The reason why I'm bringing up work product, I lose track of things. I'm only interested in this issue and no one briefed this.

So let help out again with --

MR. YOUNKIN: Sure.

THE COURT: -- when I'm making a privilege call in a patent case in the Third Circuit, does it matter whether the lawyers are from one jurisdiction or another? Does it matter -- you tell me. How do I figure out, because the states have different views about what's privileged or not. Correct?

MR. YOUNKIN: I agree with that, Your Honor, and I don't want to repeat the Rule 26 phrase if I can call it that because I don't want to sidetrack this discussion.

The common interest doctrine is not an independent privilege. It is an anti-waiver rule. So if the question is how does the common interest doctrine relate to some underlying privilege against disclosure, then the answer to what law the Court looks to depends on the basis of jurisdiction. In a patent case, we don't need to worry about that. It's a federal question.

The common interest doctrine is largely federal common law, which I understand is not supposed to exist, the Erie case, but it has been absorbed out of the criminal cases starting with joint defense and it has now become a case law doctrine.

So the answer to the Court's question, the exception is a federal case law exception, the underlying privileges or protections against disclosure are Rule 26 in this case, because I don't believe there has been an attorney/client privilege argument in this case and we can set that aside.

You were correct, if it were attorney/client privilege, then you would have to look to see if it's diversity or federal question, then federal question would be under the rules and would probably absorb common law of the state in which the communication was made, but that's not important to the Court's decision here, I don't think.

THE COURT: What --

MR. McGOWAN: So if I can --

THE COURT: Go ahead.

MR. McGOWAN: So if I can respond on the common interest question, I don't think that we're asking for a ruling of the breadth that counsel just described and I also don't think the Hewlett-Packard case is the font of all knowledge.

This Court, the District of Delaware, established the rule applied in Hewlett-Packard in the Union Carbide case with reference to protective shield in cases such as co-defendants or anticipated joint litigation.

Hewlett-Packard has a broad policy discussion of how important it is for business deals to get done, but its very specific holding tracked the Union Carbide case. And in the Hewlett-Packard case, the issue was sale of a division where the seller had been practicing the patent for the sale and the buyer was going to practice after the sale, so in all likelihood they would have wound up on the same caption as defendants with respect to different periods of time.

The Sealed Air case, when it goes back to Hewlett-Packard and reads it, also applied the joint litigation test that goes back to this Court's 1985 ruling in Union Carbide.

And our point is then the Sealed Air case is a successor liability case. It's a little unusual because the parties were worried that the transaction itself was going to be a fraudulent transfer of assets, but the Court made very clear that the liability of the seller and the buyer was the same liability.

So using the Union Carbide rule and its whole

stars of co-defendants for joint litigation, that's what the case is recognizing a common interest against Lozier turned on.

The reason I mentioned the stock acquisition is acquiring even a hundred percent of the stock of a company doesn't really matter, doesn't put the buyer on the same caption. It gives it an economic interest in the company whose assets it holds, but I've not heard Celsee suggest that Celsee has been merged into Bio-Rad so that it's now Bio-Rad. I haven't heard it suggested that it's no longer a standalone company. What has been suggested I believe is that its stock is now owned by somebody else. That's not Hewlett-Packard, Sealed Air, and it's not the Union Carbide test.

So I don't think that there needs to be any broad ruling or very general statement about the common interest doctrine. If we just follow the actual facts and holdings of the cases and bring it back to its origin, I think that that doctrine doesn't apply in this circumstance.

THE COURT: Okay.

MR. YOUNKIN: If I may, Your Honor, I need to point out --

THE COURT: No. Go ahead. I think that the challenge for you is that Union Carbide addressed a situation where there was, where both parties were likely to

be involved in what the Court called "anticipated joint litigation," and we don't have that here, do we?

MR. YOUNKIN: Well, what we have here is a company that is the -- that now owns, 100 percent owns a party to litigation. And I don't think that there's anything in the case law that suggests that this question turns on whether or not post acquisition the acquiring company is going to be added as a named defendant in the case. I think that that is a much too narrow reading of these cases and it's not what they argued.

I mean, what they argued to the Judge, to Magistrate Judge Fallon, was Courts have widely rejected the contention that a company and a potential purchaser who sat on opposite sides of the bargaining table share a commonly owned interest in contemplated or pending legal proceedings. That was the argument they presented to her, and she said, that's not correct. That's not correct under Sealed Air. It's contrary to AgroFresh and it's contrary to the Hewlett-Packard line of cases.

The cases that they cite are completely different from our case. They cite a case where somebody was going to buy a majority share of a company, just a majority share, but that's just an investment.

When you buy 51 percent of a company, you might have an economic interest, but that is completely different

from owning the company. You know, owning 100 percent of it. It's a subsidiary at that point. Right?

And --

THE COURT: Yes, but I mean --

MR. YOUNKIN: The way the deal was structured --

THE COURT: Have you read Judge Chen's opinion in Nidec? I mean, he really braces the history of the common interest privilege, and one thing he points out is that the parties have to have a joint legal interest and we don't have that here. Right? There there's no joint legal interest, is there? It's economic.

MR. YOUNKIN: Well, I think it's the same interest you see in Sealed Air or you see in Hewlett-Packard.

Nidec, all that was happening in Nidec was --

THE COURT: You know, you keep saying Hewlett-Packard, and you say, oh, it's binding in Delaware. I mean, Judge Chen didn't go with Hewlett-Packard. Right?

MR. YOUNKIN: I'm not suggesting --

THE COURT: A Delaware case, which is Union Carbide, but even it's not binding. You know, why --

MR. YOUNKIN: I agree with you, Your Honor.

THE COURT: Yes. Why should I give more to Hewlett-Packard that I give to Nidec?

MR. YOUNKIN: Well, I think for two reasons.

One, I think that Nidec is distinguishable because there, you have a situation where an investment group is trying to buy the majority stake of a company. They are not going to own it. That's number one.

Number two, Hewlett-Packard has been -- has been followed in the Sealed Air case out of New Jersey, and also, you know, we think that it is the correct, it's the correct decision.

But, you know, as I think we've been talking about, I mean, what they tried to do in a very short letter brief to the Magistrate Judge was get a ruling, and the transcript is crystal clear on this. The Magistrate says, the Magistrate asked them, if I find in your favor, won't that mean that there's no common interest when there's merger discussions? And the answer was, yes, I think that's right.

And the Magistrate Judge said, I don't think that is the law. And it's their burden now to come in and say that she, that she, like, misapplies binding precedent.

And then they point to Nidec, which is a factually distinguishable case out of the Northern District of California.

THE COURT: All right. Anything else?

MR. McGOWAN: I could comment further if the Court wishes it.

THE COURT: No. You know, I had hoped this argument would make it unnecessary for me to have to address the legal issue, but I guess it doesn't look like I'm going to be able to do that, and, frankly, it's going to take me a little bit of time.

What I would like is, I'm going to give you chance by next Wednesday to file a letter no more than 750 words to address what is the applicable law of privilege to make the decision. You know, Mr. McGowan, you can answer orally that question, but I think I wouldn't mind seeing both parties respond to that.

Whether I might look to state law, federal law, federal common law and also just to lay out how I make that decision, what's a starting point for that decision, and then what is the applicable privilege law and common interest law. All right?

MR. YOUNKIN: You want both parties to submit on the same day, Your Honor?

THE COURT: Yes. Why don't you do Wednesday at noon, so you both have to do it at the same time. You know, I think the unfortunate thing about this is, you know, you guys have to keep going with the calendar here and I'm just bothered because I still continue to think at the end of the day, I doubt this has really much probative value and, you know, I've got to spend -- we just have limited resources

and the cases are, I don't want to take the case off the track its on as far as proceeding to trial in June, but we'll just have to do what we do.

All right. Anything else from the plaintiff?

MR. McGOWAN: No. Thank you, Your Honor.

THE COURT: All right. Anything from the defendant?

MR. YOUNKIN: No, Your Honor. Thank you.

THE COURT: Thanks, everybody. Bye-bye.

(Telephone conference concluded at 11:14 a.m.)

- - -

D

EXHIBIT B

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

10X GENOMICS, INC.,	:	CIVIL ACTION
Plaintiff,	:	
vs.	:	
CELSEE, INC.,	:	
Defendant.	:	NO. 19-00862-CFC-SRF

- - -

Wilmington, Delaware
Thursday, November 5, 2020
9:30 o'clock, a.m.
***Telephone conference

- - -

BEFORE: HONORABLE COLM F. CONNOLLY, U.S.D.C.J.

- - -

APPEARANCES:

RICHARDS, LAYTON & FINGER
BY: JASON J. RAWNSLEY, ESQ. and
FREDERICK L. COTTRELL III, ESQ.

-and-

Valerie J. Gunning
Official Court Reporter

APPEARANCES (Continued):

DURIE TANGRI
BY: DARALYN J. DURIE, ESQ.
EUGENE NOVIKOV, ESQ. and
DAVID F. McGOWAN, ESQ.
(San Francisco, California)

Counsel for Plaintiff

FARNAN LLP
BY: BRIAN E. FARNAN, ESQ.

-and-

FOLEY HOAG LLP
BY: BARBARA A. FIACCO, ESQ. and
JEREMY A. YOUNKIN, ESQ.
(Boston, Massachusetts)

Counsel for Defendant

- - -

P R O C E E D I N G S

(The following telephone conference began at 9:30 a.m.)

THE COURT: All right. Can I have a roll call? Let's hear from plaintiffs, please.

MR. RAWNSLEY: Good morning, Your Honor. This is Jason Rawnsley of Richards Layton & Finger, and I'm also joined by Fred Cottrell from Richards Layton for the plaintiff.

Today we're joined by Dave McGowan, Daralyn Durie and Gene Novikov of Durie Tangri, and with the Court's permission, Mr. McGowan will be presenting the argument.

THE COURT: Okay. Thank you very much. How about from defendant?

MR. FARNAN: Good morning, Your Honor. Brian Farnan on behalf of the defendant, and with me is Barbara Fiacco and Jeremy Younkin from Foley Hoag, and Mr. Younkin will be addressing the Court.

THE COURT: All right. Very good.

Before we begin, let me just give you some -- why I decided to have a call on this.

First of all, I think it's a very interesting

issue, and by issue, I mean the common interest issue. But I'm very concerned this is really not teed up. I mean, I think that that issue is complicated. I don't think there's any binding precedent, and it just doesn't seem to be teed up in a way that would permit me to make a really informed decision about the scope of the common interest exception under these facts. That is one issue.

The second issue is the way it was teed up, I find it very confusing, because on one hand, the defendants have expressly stated in their letter to the Magistrate that they didn't want any attorney impressions. Basically, in the footnote, as far as I'm concerned, they're basically saying we don't want work product and yet they seem to be pursuing work product.

And there's a footnote from 10X in its papers where it does raise a relevance objection, but I don't know that there was any kind of briefing or consideration in front of the Magistrate about proportionality and relevance and burden, so I want to hear about that.

So I think both parties can be guided in their arguments by what I've just shared. And then I would ask at the outset from plaintiff to just tell me the status of things. Was the deponent -- was there, in fact, a second deposition? Where do things stand in terms of discovery in the case generally? And so let's hear first then from the

plaintiff.

MR. McGOWAN: Thank you, Your Honor. This is David McGowan from Durie Tangri. I will try and take the Court's guidance in I think reverse order.

Your first question was, is -- are the plaintiffs seeking mental impressions as opposed to some non-work product material. The distinction that's being drawn that the Court references is between the merger negotiation and between the work product and the types of things that in these cases are considered work product, which would be, for example, an opinion letter from the underlying litigation was at issue in the Hewlett-Packard case, but the distinction is between what were the attorneys in the litigation thinking about and pondering inside their heads and what the parties to the merger negotiations said to each other across the table.

The across-the-table discussions we do not think are work product under Rule 26 or any precedent and they're also not deliberations that are inside the head. They're statements in a negotiation.

If I might proceed stepwise and see if that clarifies the scope for the Court.

THE COURT: Well, so I appreciate -- I mean, frankly, the way you just kind of did it, I mean, that's the way I do it, I think of it. I'm not sure your papers did

that in front of the Magistrate especially because of the footnote you dropped.

And the way I looked at it is you had two depositions. I read the papers last week, so I may get something wrong here. But my recollection is the deposition conducted by Ms. Durie, the questions went to what was put into the data room, into the virtual data room. Is that right?

MR. McGOWAN: The question, the specific question that was teed up is what were the considerations that went to the holdback number with respect to the instruction that they're citing.

THE COURT: Okay.

MR. McGOWAN: So there are two different questions, the Court is exactly right. And we are proceeding in view of that distinction, I think, in Exhibit D, Mr. Starks' deposition, the question that led to the instruction the defendant cites in its footnote, in its papers to this Court, that what were the considerations that led to the holdback number and there was an objection on work product and privilege ground.

THE COURT: Right.

MR. McGOWAN: In a subsequent corporate witness deposition of Mr. LaPointe, the questioning was drawn specifically to conversation, and when that question was

withdrawn specifically to conversations, there was not a work product objection. There was an objection based on, quote unquote, "common interest privilege," which doesn't exist in our view as a standalone privilege.

There are two depositions. There are two different framings of the question.

THE COURT: Yes. Let's go to the first, the first one, because -- hold on a second. Give me a second. All right.

And this conversation points to why I've got concerns about the way the issue was teed up. So I'm looking right now at document 204-1, which is the transcript of the deposition that Ms. Durie conducted, and at page 287, there's a question.

And these -- incidentally, these questions and these responses were cited by you in your briefing. And so the first question is found at line 16 of 287.

Question: So can you tell me, do you know, Mr. Stark, what information Celsee provided Bio-Rad about the 10X litigation in the virtual data room?

And Mr. Younkin said, that's a yes or no. You can answer that question.

And so the witness answered. Actually, the witness asked for some kind of repetition. And then if you turn to page 288, the question is repeated. The witness

said, I believe I do, yes.

Then the question is: What information did Celsee provide?

Mr. Younkin at that point objected: I'm going to instruct the witness not to answer the question on the grounds that it calls for work product protection material. All right.

Then Ms. Durie asked: Did Celsee provide information Bio-Rad about the 10X litigation outside of the virtual data room, and then again, there's an objection.

Now, this time Mr. Younkin says: I'm going to instruct the witness not to answer that question as phrased on the ground that it calls for privileged and work product information.

So then if you go to the next page, page 289, the question that again where we have an objection is, the question is: Did Celsee provide any information Bio-Rad about the 10X litigation outside the virtual data room between the time the letter of intent, the non-binding letter of intent was signed and the time the parties entered into the ultimate transaction?

The witness was permitted to answer that question initially, and then though there was an objection, and the objection was for both privilege and for work product.

So in there, this witness I do see, the way I look at it is, there are two things now at issue with this witness. One is questions that are being addressed about the contents of the virtual data room, there's a work product objection. Questions that are addressed by the negotiations between the two parties, it looks at the very least it's privileged and perhaps it's also work product.

Then later on there's a question I think you're talking about, which says, did the parties -- this is on page 291 -- did the parties discuss in connection with negotiating this non-binding letter of intent whether the escrow holdback would include some for the 10X litigation?

And then on that one, there's a work product objection, not a privilege question, a work product question, and that's found at lines 19 to 22.

Then the next -- well, that's it, I think. Right? So that's the first deposition.

So as I understand the objections for that deposition, there are really two issues. One is, what's put in the virtual data room and that's a work product objection. And then the second one is conversations between the two parties, and there's a, it looks like I will give you the benefit of the doubt, an attorney/client privilege objection and a work product objection.

All right. Now, in your papers before the

Magistrate you say, we don't want any work product. I mean, you say you don't want any attorney impressions. That, to me, I'm treating synonymous with you don't want work product.

So what is it, you know, that you really want, I mean, when I look at that?

MR. McGOWAN: So the note in the submission to the Magistrate indicated that we're not trying to delve into their files, which was a reference to the kind of material that is discussed in the Hewlett-Packard case, which is something that's created to the litigation, may have been transferred, but which exists on a standalone basis as a work product doctrine. That would correspond possibly, because we don't know the contents, to something that would have been put in the data room, but it exists independently of the conversations and the negotiation. It sits there and maybe somebody looks at it. Maybe they don't.

It's not something that is said back and forth verbally or exchanged back and forth in an e-mail as a counter-proposal or something like that.

But I do believe that distinction tracks. The 30(b)(6) witness on this topic, Mr. LaPointe, which is in Exhibit B, and the instruction there is somewhat different as the scope was more highly drawn.

And I apologize, Your Honor. When you were just

reading the second excerpt that you were reading, I missed the page number you were on. The portion that I was referring to was on page 298, 3 to 14, which is what defendant cited in its submission to this Court. My apologies.

THE COURT: Right. 298.

MR. McGOWAN: Eight to 14. My apologies.

THE COURT: And that is a specific question. It's another one. I didn't read that one, but that's another one. What were the considerations that led you to the [redacted] number, and there's an objection. Don't answer because it calls for the disclosure of privileged and work product information.

MR. McGOWAN: That's the, that's the reference, it's my recollection, that defendant cited in its submission to this Court saying that the defendant did instruct on work product grounds.

We then have the 30(b)(6) deposition --

THE COURT: But this is my point. You say you cite that to me. What did you cite to the Magistrate?

MR. McGOWAN: To the Magistrate, we did not understand that they were taking the position that the negotiations themselves are work product because the instruction to the corporate witness was the common interest instruction with respect to discussions.

What we tried to do with the Magistrate is narrow this down somewhat. We're trying to narrow it down somewhat here so that we present a cleaner issue in an effort to actually tee it up than is sometimes presented in the cases where you have underlying work product doctrine material.

So what we presented to the Magistrate was an effort to get at the back and forth, so I don't know if that's responsive to your question. What we're focusing on both here and before the Magistrate is the communications themselves. So if the Court's question is, where is the argument to the Magistrate, it would be in the transcript before the Magistrate at page 27.

And --

THE COURT: Well, wait. Well, let's go to your letter, because you've got to tee this up in your letter. So where is it in the letter?

MR. McGOWAN: I mean --

THE COURT: And the reason I'm getting at all of this because, see, I think this is a really important issue. Right? It deals with privilege. I don't think it was teed up really cleanly, and I'm not faulting anybody because there were a lot of discovery issues and it's in the middle of a deposition. And I mean, frankly, the fact that it was the third issue is my recollection in the letter, it was

almost like it didn't seem this was the most pressing issue and yet I don't want to rush into a very important decision about privilege and work product when it really hasn't been teed up.

And then, and I think you are cleaning up things now, and, again, I'm not necessarily faulting for that, to try to make it like it's, you know, a narrow issue. But, see, then that's why I want you to get back to the practical issue, which I asked you to open up with. Where are things, because, you know, it's almost like we should just present this anew, and therefore it's important for me to think about proportionality issues, burden, probative value of the information being sought, and so that's why I want to know, where do things stand? Did you, after the Magistrate ruled, was there another deposition of any witness?

MS. DURIE: Your Honor, this is Daralyn Durie. May I address that issue?

THE COURT: Sure.

MS. DURIE: Your Your Honor, so we did take a second deposition of Mr. Stark. It was extremely abbreviated and there were literally a handful of questions that Celsee permitted, but we were not able to get any further information from Mr. Stark on this topic. The only information that he provided was the identity of the lawyers whose analysis had been referenced in the investor letter

and that was that.

THE COURT: Okay.

MS. DURIE: So from our perspective, this does remain very much a live and important issue.

THE COURT: All right. And where does the case stand? See, this all became an issue right at the very end of fact discovery, or you tell me. When did it come up in terms of the case schedule and where do things stand with the case schedule?

MS. DURIE: It did come up towards the end of fact discovery and we are now in the process of submitting expert reports.

THE COURT: All right. So fact discovery is over?

MS. DURIE: It is.

THE COURT: All right. You're in the middle of expert discovery. Do we have a trial date?

MS. DURIE: We do, Your Honor. The trial date -- go ahead.

MR. McGOWAN: I didn't mean to interrupt. We do have a trial date, Your Honor, yes. It's June 14th.

THE COURT: June 14th of next year. Okay. When are summary judgment motions due?

MR. McGOWAN: February 5th, Your Honor.

THE COURT: All right. What do you hope to get

from Mr. Stark? Give me some examples of the information that you think you could get if there were no objections and explain to me its probative value.

MR. McGOWAN: Okay. Your Honor, this is Dave McGowan again. I can respond to that.

If I may just note for the record, the answer to the question that you asked, where was it raised in the submission to the Magistrate, is at page 3 of the letter where both the Stark and LaPointe transcripts are cited in limited portion that we referenced.

THE COURT: Okay. Hold up, hold up. It's page 3 of the letter?

MR. McGOWAN: Page 3.

THE COURT: Right. And you say, you just broadly say -- basically, you went through what I cited, which is the 287 to 291, 295 to 296, and then the one we just covered, 298 to 299. Correct? And then you also point to the LaPointe transcript at 55, 56 and page 59. Correct?

MR. McGOWAN: Yes. The LaPointe transcript is the distinction I was drawing earlier. The LaPointe transcript is drawn to conversations and the assertion at those pages is common interest.

THE COURT: And I read that. I agree that that was teed up. Okay.

MR. McGOWAN: In answer to the Court's question with respect to relevance and probative value, the communications between the two parties regarding the litigation are relevant to the issues certainly of infringement, damages, in the sense that what the buyer in these cases is asking is, what's going on in this case? How do I think about it?

Now, this is just a stock acquisition. This is not one of the cases where the buyer is getting a division, they're going to keep selling the product and wind up being a joint, joint defendant, which is what all the other cases are like, and it is a not a successor liability case as far as the defendants are arguing.

But what they are asking is, tell us how right we should be about this, how right do you think we should be, and the buyer and the seller are going to have different takes on that presumably, but they are going to talk about the underlying merits from a business point of view in the sense that they are going to translate the business practices of the defendant in the dollar terms based on whether the defendant is practicing the patent, the kind of information that is relevant to the Georgia-Pacific factors, how important is this business, what kind of a holdback do we need to cover ourselves, what implications does this have.

When you go through the Georgia-Pacific factors, a lot of them are about the competitive position of the business team, the value of the invention. In essence, how significant is this.

THE COURT: Can I stop you for a second?

MR. McGOWAN: Yes.

THE COURT: So, all right. So you are telling me that these negotiations occur when?

MR. McGOWAN: These negotiations are in 2019.

THE COURT: All right. And what is the time frame that I'm supposed to consider in applying the Georgia-Pacific factors to ascertain damages or what a jury would be instructed to consider? What is the time frame?

MR. McGOWAN: So you're going to look at it on the eve of first infringement typically subject to the Book of Wisdom, which means that sometimes you can do a lookback.

To the extent that the negotiations are addressing --

THE COURT: I'm not a patent lawyer.

MR. McGOWAN: Sorry.

THE COURT: I'm thinking Bible when you say Book of Wisdom, so I don't know what that means and I don't know what the clause you said afterwards. But, you know, I don't have your expertise, so I have to go back to, so the

negotiations that we're talking about are occurring in 2019. Do you have a month?

MR. McGOWAN: August is my recollection.

THE COURT: Okay. And then infringement for damages in the patent, this patent case, I'm supposed to look to Exhibit 8 of first infringement. When is that alleged by you to have occurred, or actually by Celsee to have occurred?

MR. McGOWAN: I need to look at it by month.

THE COURT: That's all right.

MS. DURE: Your Honor --

MR. McGOWAN: I misspoke, Your Honor. Negotiation of the letter of intent is December of '19.

THE COURT: December of 2019. Okay. But that's the letter of intent. So beginning December of '19 and extending into what would cover the negotiations?

MR. McGOWAN: So the date range is the case is filed in May. The negotiation of the initial NDA is September of '19. The letter of intent on which the Magistrate relied is December of '19. The business transaction is done, the acquisition is in April of '20.

THE COURT: Okay. Great. All right. So it's going to be some time between December of 2019 and April of 2020 when the conversations about which you would like to learn occurred. Is that correct?

MR. McGOWAN: And if I can go back to the Court's --

THE COURT: Sorry. We didn't hear an answer. I think it might have been a technical thing.

Am I correct, the time frame of the negotiations about which you'd like to discover evidence, those negotiations occurred between December 2019 and April 2020?

MR. McGOWAN: That is correct, Your Honor.

THE COURT: Okay. Sorry. All right. Now, so then let's go back to date of first infringement. What are we looking at? What's the time frame for that?

MR. NOVIKOV: Your Honor, this is Gene Novikov for 10X.

I can answer that quickly as folks try to marshal back. December 8, 2018.

THE COURT: December 8, 2018. Okay. All right.

So then, and forgive me, sir. It's Mr. -- what's your name again, sir?

MR. McGOWAN: McGowan.

THE COURT: McGowan. Sorry.

So, Mr. McGowan, why is it probative what folks are thinking about in 2019, when I'm supposed to be looking at what occurred or at least I'm supposed to be using the time frame as of December 8, 2018?

MR. McGOWAN: Sure. Thank you, Your Honor. And

I apologize for the Book of Wisdom reference. I tried to clarify that. I try to avoid jargon. The Court is quite right, this is a general issue, not a patent specific issue.

To the extent that the business discussions bear on the question of what are the prospective damages from the case, part of that is going to have a liability element. Part of that is going to have a damages element.

The damages element, there should be no difference between what is said in the business discussions and the date of hypothetical negotiation, because the date of hypothetical negotiation is part of the damages input, and to the extent the business discussion and the merger is talking about what do we think that number will be, it's going to be talking about the process of estimating the value of litigation.

So from that point of view, there is no difference between what one would expect the business discussions to be focusing on and the analysis the Court would do in a damages context.

The reference that I made to the Book of Wisdom refers to the Supreme Court case and some District Court cases that indicate that in some circumstances, if there's relevant information during a period of time after the hypothetical negotiation, that can be taken into account as

well. It is not prohibited. It is true that under the Georgia-Pacific factors, typically look at the date of first infringement. There's not a flat prohibition on considering subsequent evidence, and sometimes that happens. And, for example, people are looking at changing the business practices, which one would expect to be part of an acquisition negotiation as well.

So --

THE COURT: Okay. Sorry. Let me just push you back though. Let's assume there were no negotiations. Right? I'm going to go back, or the jury is going to be asked to go back to December 8, 2018, and consider the Georgia-Pacific factors. Right?

Now, do the Georgia-Pacific factors include anything about the trial judge's proclivities or a philosophical approach to patent cases and damages?

MR. McGOWAN: Ideally, they certainly don't say that, and one would expect that that is not something a juror would be instructed on.

THE COURT: Okay. Do they consider the quality of the lawyers that are engaged in the patent lawsuit that's before them?

MR. McGOWAN: The Georgia-Pacific factors don't. I don't know if the Court is asking me two questions. The jurors -- I think that would be up to them.

THE COURT: Well, okay. That's fair because it's a pretty bad question.

My point is that we don't ask jurors, and, in fact, I think the law would preclude us from asking jurors in deciding whether damages should be awarded and how much damages should be awarded to consider all of the things that lawyers consider when they evaluate a case, right, which would include things like the quality of the judge or the philosophy or proclivities of the judge, whether the jurisdiction is a plaintiff or defendant-friendly jurisdiction, how good the lawyers are, how much time has been spent in developing the case, all of these kind of legal strategic things. Right?

You would agree that that is what really goes into or at least it plays a prominent role in any assessment of the value of a case. Right?

MR. McGOWAN: I think with respect, Your Honor, I would provide qualified agreement. I think that might reflect the litigation side, but I would not presume, and certainly I don't think there has been a proffer to this effect, that that is what the business discussions are about, because the business discussions from the buyer's side are, we're going to buy the stock of this company. We see there's litigation out there and we need to pick a number to protect ourselves.

It would surprise me, quite candidly, if the only thing the businesspeople talked about were things that business lawyers don't do day to day, which is proclivities of judges, this and that.

I certainly would not assume that the discussions that are the subject of the present motion would exclusively bear on specific factors unrelated to the business of the defendant, the infringement of the defendant and the economic consequences of that infringement. It would surprise me if there were only litigation tactics discussed in a merger where you've got corporate people talking to each other. If that's the testimony, then that would be the testimony, but we don't know that and I don't think we can assume it.

THE COURT: All right. Now, this is a stock acquisition. Right? You mentioned that?

MR. McGOWAN: That's what the letter of intent states.

THE COURT: What was the ultimate transaction? In what form did it take? How was it structured?

MR. McGOWAN: I don't have the answer to that question at my fingertips. I believe it was consistent throughout, but I need to look that up.

So --

THE COURT: So you don't know if it was a stock

acquisition or a merger, or we just don't know. All we know is that at the time of the negotiation, Bio-Rad wanted to buy stock. Right?

MR. McGOWAN: At the time of the letter of intent on which the Magistrate relied, the letter of intent recites a stock date.

THE COURT: Right.

MR. McGOWAN: And I have nothing to contradict that.

THE COURT: And I might have overstated it. Right? It's not that -- I mean, it's probably more precise to say Bio-Rad was interested in purchasing stock.

MR. McGOWAN: Correct. It is a nonbinding letter on the system, and in our view, that distinguishes it from most of, on whole of the common interest case law, which there found to be a common interest.

THE COURT: Right. So I go back to understand how exactly this was presented to the Magistrate or how it ought to be presented today. You know, in footnote 3 you write, 10X is not seeking attorney files or mental impression, but rather information concerning the negotiation of the agreement between counterparties, but then the questions you cite, at least a lot of them, go to the content of the virtual data room.

So maybe, I mean, is it fair to say that really,

you're not pursuing, you don't need to know what's in the data room? All you want to know is what was said across the table?

MR. McGOWAN: What we're pursuing in this submission is the across-the-table communications. That would be for the e-mails.

THE COURT: And you had an agreement, I think, right, that there would be no logging of documents that postdate the beginning of the litigation. Is that right?

MR. McGOWAN: That is correct.

THE COURT: And you want what? A 30(b)(6) witness to come in and just answer questions about what was said to Bio-Rad during the negotiation. That's, at the end of the day, what you want. Is that fair?

MR. McGOWAN: Fair. Yes, Your Honor.

THE COURT: All right. Anything else you want to bring to my attention?

MR. McGOWAN: The only point that I'd like to make is that I believe that this can be done simply on the law just by looking at Rule 26, because in our view, the across-the-table communications and work product in the first instance.

THE COURT: Wait, we had a technical glitch. Can you repeat that because I don't know what you said between privilege and work product, so can you just start?

MR. McGOWAN: Sure.

THE COURT: What did you say? We can resolve by looking at Rule 26 because what?

MR. McGOWAN: Because we don't believe the across-the-table communications are work product in the first instance, and we believe the Magistrate treated them as being work product.

THE COURT: Well, I mean, look, and this may be -- I mean, they could be work product to the extent if somebody from 10X said, my lawyer told me X, Y and Z because she thought blank because she thought A, B and C, I mean, that's work product. Right? It's communicating work product. You would argue it's waiving it, but the point is, it is conveying the mental impression.

MR. McGOWAN: Right.

THE COURT: And you said you're not interested in getting those. So that's why you, you know, say you're not seeking attorney mental impressions, so it seems to me based on that footnote, you shouldn't get to get work product even if it were weighed during the negotiation.

MR. McGOWAN: And I apologize if it's unclear. I think that if a statement is made across the table, that's, A, not work product; and, B, if there were work product, it would be waiver, and we can talk about the Philippines case and selective waiver and all the rest.

What we're trying to indicate in that footnote is, we're not trying to dive down into the underlying documents and the litigation files. We're trying to distinguish what we're asking for in the Hewlett-Packard case, Sealed Air case, where they are trying to go down into the litigation files. We're trying to stay across the table.

If across the table a lawyer or a businessperson in a corporate setting recites something, then that recitation is not work product, and it's strictly a waiver analysis, we think the error that we want to draw to the Court's attention is in treating those statements themselves as work product.

I believe the law on waiver would establish that the communication constitutes a waiver because we don't have the facts that were put within the common interest stock, but the distinction we're trying to draw is between litigation files and across the table, and I apologize if I was not clear on that point.

THE COURT: Well, that's all right. But, see, you know, the thing is, work product, it's a different test whether work product has been waived. And would you agree that at least there are circumstances where an NDA -- let me start again.

There are circumstances where parties share

attorney impressions pursuant to an NDA and there would be no waiver because under Westinghouse, they did take appropriate measures to try to guard the secrecy of that and limit the distribution of that work product?

MR. McGOWAN: I think that the answer to Your Honor's question is a qualified yes. The qualification comes from the requirement in the common interest cases that there be a common legal interest as this Court said, in the Dow chemical case, such as co-defendants or anticipation of joint litigation.

Just for the record, I think that the rule on this is stated in the Philippines case, the Republic of the Philippines case at page 1429, where the Court says, a party who discloses documents protected by the work product doctrine may continue to assert the document's protection only when the disclosure furthers the doctrine's underlying goal.

I agree that work product and privilege have some different aspects. The purpose of work product is to prepare for trial. Rule 26 says, in anticipation of litigation or for use at trial.

It is not anything that happens because litigation is out there. It's not the case that if I have to rent extra office space in order to accommodate the files of the case, that the lease agreement becomes work product

and is subjectively the reason I did it is because of the litigation. It's a purpose driven doctrine, and the point is whether the communication in question furthers the purpose of the doctrine.

In the Hewlett-Packard case and the other common interest cases in Maine, disclosures are found within a common interest when there is a common interest such as being joint defendants, and the disclosure relates to that interest.

THE COURT: Right. Now, on this though, let me just stop you, because you didn't argue any of this to the Magistrate. Right?

MR. McGOWAN: I think that before the Magistrate, I think that what we did is argue that -- we argued the instruction we got. We did not understand at the time that they were going to claim that, the defendant was going to claim that the negotiations were themselves work product, so what we argued was the common interest point.

THE COURT: Right. But, see, in fairness to them, I know you apologized for it. You don't need to apologize, but you have.

I mean, I go back to how you presented it in footnote 3. You said you're not seeking attorney files or mental impression, and that's why I began the conversation by just talking about dissatisfaction on my part in the way

the thing was teed up. I'm not faulting anybody, but just that's the reality. And a lot of the questions in the first deposition were really designed to find out what was in the data room, and I could see in the data room there being what would normally be called work product, like opinions of counsel about validity or invalidity of patents, things like that.

MR. McGOWAN: Sure.

THE COURT: But I'm just going to tell you right now, I mean, I think you've waived your right to pursue that because of the footnote, the content of the footnote says it, and it sounds like you're not pursuing the data room documents anyway. So I think that I'm just going to go ahead and say that's the way I am going to rule, that you have -- by footnote 3, you waived your right, or at least you didn't tee up, and it's too late to do so now, to find out or obtain documents that would reflect the mental impressions of attorneys.

And, furthermore, it sounds like this morning you're saying you are not even pursuing documents from the data room at this point. You want to limit the scope of your discovery requests to oral and e-mail communications between the parties between December 2019 and April of 2020. Is that right?

MR. McGOWAN: Yes. And just to go back to the

point you just made, it was at the end of footnote 3 where we say we're not seeking mental impressions, but information concerning the negotiation of the agreement. What we're doing, in fairness, I think is consistent with the negotiations point even in that footnote.

THE COURT: Well, but I raised it because I think it explains why -- you know, you say you didn't raise these, this issue of Westinghouse or what's the purpose of the disclosure. You're faulting 10X. I'm sorry. You're faulting Celsee, and I'm not finding that very persuasive. It sounds like you have raised cases in the first instance before me that weren't addressed to the Magistrate.

MR. McGOWAN: May I have one brief response to that, Your Honor?

THE COURT: Sure. Go ahead.

MR. McGOWAN: As I said before, when we were going through exhibits, Exhibit G, by focusing on communication, we were focusing on the line of inquiry where the objection was straightforwardly common interest. I don't think that there was any effort made at any point in time to establish that a negotiating statement is a work product statement, but the briefing before the Magistrate focused on the question whether there was a common interest, and we discussed the Hewlett-Packard cases on most of those. But I don't believe there was ever any effort to establish

that the communications were themselves work product. The objection of the 30(b)(6) deposition, a common interest privilege.

THE COURT: Well see, I disagree. That's why I read it to you at the outset. I mean 291:

Question: Did the parties discuss in connection with negotiating this nonbinding letter of intent whether that escrow holdback would include some for the 10X litigation?

Mr. Younkin: Instruct the witness not to answer that question on the grounds it calls for work product. That sounds like a work product objection.

MR. McGOWAN: Right, but I was referencing the 30(b) deposition.

THE COURT: Well, okay. All right. But you cited before the Magistrate, and I thought that was -- the discovery issue is related to both depositions.

MR. McGOWAN: It is. The more specific to the communications in the negotiation I think is the 30(b) instruction. That's the point that I'm making.

THE COURT: Okay. All right. We have narrowed it now, I think. We have narrowed it to all you want are oral and e-mail communications between December '19, April 2020, between Celsee and Bio-Rad relating to the escrow and fees, expenses and damages relating to this

case.

MR. McGOWAN: I would say the litigation. I don't know if there are things that are --

THE COURT: Okay.

MR. McGOWAN: -- related to the escrow that are in there, because we don't know what was said yet.

THE COURT: Right.

MR. McGOWAN: A fair summary.

THE COURT: Okay. That's where we are. All right. And you want to also get from that any statements that may have conveyed attorney mental impressions?

MR. McGOWAN: Yes. Anything that was said back and forth, our view is not work product in the first instance, and if it happened to convey work product does not fall within the common interest exception for waiver.

We have not discussed the details of the exception a lot, but it caches out to just what the Court said. If there is a mental impression and an across-the-table statement, our request is that that would have to be disclosed as well. What doesn't need to be disclosed are the things sitting in the files themselves or things just sitting in people's heads that were not stated.

THE COURT: Okay. And then on the merits -- I don't know if it's the right word, but on the common

interest issue, I mean, your position is it's a non-binding letter, the negotiating across the table from each other. It's a stock acquisition, so it's not like Bio-Rad has taken on the defense of this litigation and so the cases that are cited by 10X are inapposite. Is that a fair summary?

MR. McGOWAN: Fair summary, Your Honor. Yes.

THE COURT: Okay. All right. Let me hear from the other side then.

MR. YOUNKIN: Thank you, Your Honor. This is Jeremy Younkin.

I think if I may just at the outset point out that there were really two independent grounds for the Magistrate Judge's decision, and so one of them was the squarely work product.

And so as we have discussed today, 10X stated in their footnote that they were not interested in attorney mental impressions, and then the Judge asked, well, why do you want this information?

And they said, because we think, as we've heard today, that the negotiation is going to reflect the parties' views about the value of this case. And, indeed, I think Mr. McGowan has made it clear, it's their theory this evidence is relevant because, you know, it's going to reflect, you know, quote, "how worried we should be and what are the underlying merits of the action and what are the

potential damages."

And when Magistrate Judge Fallon heard that, she said, I can't think of a clearer example of work product, and then she said, that work product protection was not waived because it is difficult to waive work product. You need to do something that allows your adversary to find out the information, and that was not done here.

Celsee and Bio-Rad were talking to one another under a nondisclosure agreement about an acquisition and there was really no risk that 10X was going to get the information and so work product protection applies and it wasn't waived, full stop. I mean, and that standing alone without even getting into common interest case law provides grounds to affirm Magistrate Judge Fallon's decision and finds --

THE COURT: But I mean I feel bad for Magistrate Judge Fallon because I just think the way it was teed up was kind of unfair to her.

So let's go to the transcript that you've just recited. What page are you on?

MR. McGOWAN: Well, her statements, if you look at the very end on page 38 of the transcript.

THE COURT: Right.

MR. YOUNKIN: She says, in addition, even putting aside the common interest doctrine, so she is taking

that out of the equation, the work product doctrine affords an additional basis for protection of the information that plaintiffs plaintiff seeks to compel.

THE COURT: Right. Now, you know, it's not clear to me. What is she talking about? The information the plaintiff seeks to compel? What's the information the plaintiff seeks to compel that she's referring to?

MR. YOUNKIN: I think what she's referring to are the communications between Bio-Rad and Celsee about this litigation. And so the way that this kind of came up, Your Honor, if you turn to page 28 of the transcript --

THE COURT: Right.

MR. YOUNKIN: Okay?

THE COURT: I'm there.

MR. YOUNKIN: Okay. So this is Mr. Novikov arguing about why he says the negotiations of the escrow provision are not subject to common interest, and I will just point out that Mr. Novikov opened with this argument and so clearly 10X understood --

THE COURT: Sorry, sorry. What line were you on and then start again.

MR. YOUNKIN: Page 28. 28, Line 7.

THE COURT: Okay. All right. Got you. Thanks.

MR. YOUNKIN: Okay. So this is 10X arguing, and they say that their assessments, meaning the Bio-Rad and

Celsee's assessments or representations as part of that back and forth about how much this litigation is worth, and then what financially they view the risk to be is certainly highly relevant to a number of issues. And so Judge Fallon's reaction to that is found on page 36.

THE COURT: Okay.

MR. YOUNKIN: And if we look at line 16 -- sorry, the beginning of that paragraph around line 10, she's talking about these communications. I think there, clearly we're talking about the communications between Celsee and Bio-Rad about the escrow provision.

And then at line 16, she says, these go to the very heart of what the parties think about what this case ending in litigation is worth, and I can't think of a clear example of what might be protected by the work product privilege.

And, indeed, we've heard today that their whole theory of this evidence is that it will reflect each party's mental impressions about this litigation -- the strengths, the weaknesses, the damages. And that sort of evidence is -- it's just product information.

THE COURT: Hold on. I agree with you. All right. So on that statement, I do understand that, and I do think there's no question about it. Then I think we've got an issue about whether there's a waiver of disclosing it.

MR. YOUNKIN: Okay.

THE COURT: And so the way I look at it is that because of footnote 3, that wasn't teed up. In other words, the way I look at it is the footnote 3 -- sorry. Hold on one second.

There it is. In footnote 3, the statement that 10X does not seek an attorney files for mental impression. So as far as I'm concerned, they don't get to get -- they are not asking the Magistrate to force them, to force a disclosure of mental impressions. That wasn't teed up and so I'm going to affirm the Magistrate to the extent that she said that on page 36 that Celsee's evaluation, or, rather, Celsee's attorney's evaluation of the case is quintessential work product, I think that's true. And why I am going to affirm her, I'm not sure this is the reason she made the ruling, but I'm going to affirm it is, you can't in a, what is effect effectively a motion to compel, which is the letter dated September 21, 2020, at DI 204, you can't say you're not seeking attorney files or mental impressions and then expect to get them.

So I don't have to get into whether or not there was a waiver of work product during the course of these negotiations or not because that issue in my mind wasn't properly brought up to the Magistrate, and, in fact, it was essentially -- it was waived, and so I'd affirm her on that

issue.

So now what I think is left though -- well, what's left in the negotiation and the back and forth, okay, where there's not a disclosure by Celsee about the impressions of their attorney as far as valuing the case, but there are negotiations, other statements they made that do not reveal work product.

Now, why shouldn't 10X get that information?

MR. YOUNKIN: Well, I don't think actually that they are seeking that information. I mean, I think --

THE COURT: Well, I mean, I think Mr. McGowan is seeking that information.

Mr. McGowan -- wait. Let me just ask him because I thought it was pretty clear, that's what he wants. He just wants as well any disclosures that included work product.

Mr. McGowan, that's what you are seeking. Right?

MR. McGOWAN: The Court is correct. If it's across the table, it s the subject of our submission to the Court.

THE COURT: Right. But, okay.

MR. YOUNKIN: Okay. But I think we're potentially talking past each other here. I mean, Mr. McGowan's position is anything said across the table he

wants, and I think Your Honor just said, well, if it's work product material, you don't get it.

THE COURT: Correct.

MR. YOUNKIN: And so my -- right.

THE COURT: But there's still a lot of other information. I mean, in other words, a person across the table could say, he could say, I think the case is worth this much, or she could say, I don't know who the 30(b)(6) witness is going to be. She could say, you know, we think the case is worth this much, or she could say -- I mean, she could make revelations about a lot of stuff without disclosing work product.

MR. YOUNKIN: Your Honor, I disagree with that. I think if somebody says I think the case is worth X, that is a disclosure of -- I mean, that's protected by the work product, because that is one party telling the other party its mental impression about the value of the litigation, which is, of course, informed by, as I said, that's clearly a mental impression about the value of the case.

And so --

THE COURT: Hold on. Attorney work product goes to the attorney's mental impression. Now, the client might agree with the attorney or disagree with the attorney, but the client's ultimate mental impression is not the attorney's mental impression.

The other thing is, and I'm sure you're familiar, I mean Upjohn, all the work product cases distinguish between fact and opinion. And so what I want you to focus on now, so this is the issue. I'm basically, I'm not going to allow Celsee to get a disclosure of the mental impressions of 10X's attorneys. Okay? They've waived that by their footnote. So to that extent, I'm affirming the Magistrate.

What remains to be decided is, what about the rest of the negotiation? And I am concerned that the Magistrate Judge read too much into AgroFresh. I'm concerned that AgroFresh and the other cases upon which you rely don't really apply here, and yet I'm also concerned, as I mentioned in my questioning of Mr. McGowan, about how probative is this stuff and is it even wore worth the burden of a deposition.

And, you know, I see where you drop a footnote in your papers in front of me based on relevance, but did you do that in front of the Magistrate? Did you argue proportionality or burden or relevance in front of the Magistrate?

MR. YOUNKIN: I believe that I noted it during the hearing, Your Honor, but really, the way that the issue was teed up was, it was an argument to that privilege instructions given at a deposition were improper, and so

that was their argument, and so we were defending the privilege instruction.

I did note at the hearing that the relevance argument seemed a bit stretched, but certainly, we weren't instructing the witness not to answer a question at a deposition based on relevance grounds.

I do think --

THE COURT: I've got the transcript in front of me, where did you say that or something about burden, relevance, or any considerations, proportionality?

MR. YOUNKIN: Yes. And this may have been -- this may have actually been in connection with the first argument.

Yes. I mean, so to be clear, the statement is that I was referring to is on page 19 and it really is dealing with the first of the two arguments that were before her.

THE COURT: Okay. So the bottom line is, you really didn't argue proportionality or overly burdensome or even relevance as a basis to prevent further deposition of this 30(b)(6) witness. Correct?

MR. YOUNKIN: Not with respect to this argument. That's right.

THE COURT: Okay. So then I think we're stuck. Right? So then I do have to, it looks like, address the

common interest doctrine and whether it applies. Is that fair?

MR. YOUNKIN: I actually don't think that that is correct, Your Honor, because I think that the waiver, the waiver rules around a work product are much more stringent than the waiver rules --

THE COURT: I'm not going to give them work product. I've already said that. You've won that.

MR. YOUNKIN: They don't -- okay. I think there is still an open question about the limits of that though, because, firstly, I do need to say that the work product doctrine does not just protect attorney mental impression. It also protects the mental impressions of a party about litigation, so that's number one.

Number two --

THE COURT: All right. So, wait. Now, this is an example of, unfortunately, you guys are asking me to make a pretty, you know -- there are few things more important than attorney/client privilege and attorney work product.

Do you have a case that says that if I ask a client about the client's mental impressions, that that is prohibited by the attorney work product doctrine?

MR. YOUNKIN: Well, Your Honor, yes. I think that just the plain language of Federal Rule of Civil Procedure 26(b)(3) --

THE COURT: All right. Hold up. Let me pull it up. 26 what?

MR. YOUNKIN: (b)(3).

THE COURT: Okay.

MR. YOUNKIN: Okay. So, and this is Section A.

THE COURT: All right.

MR. YOUNKIN: Which is basically the work product rule. And it says, ordinarily, a party, 10X, may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party, another party, or its representatives, including the party's attorney.

And so a party, you know, a company gets a demand letter or something and the CEO works on it and forms a mental impression about the value of the case. That can clearly be work product. And so when you have --

THE COURT: Well, I didn't say it couldn't be, but --

MR. YOUNKIN: I was just trying to make the point that work product protection is not limited to an attorney's mental impressions, that it also covers a party's mental impressions about a litigation. And here, that's all they want. All they want is a party's mental impressions about this case, and I think Judge Fallon heard that and she said, that's clearly work product. You don't get that.

And, you know, I think in this case, too, I mean, attempting to tease out, you know, even if you were to say, well, okay. Let's try to distinguish the lawyers's mental impressions from the negotiators mental impressions, I mean, I'm not even sure how you could possibly do that, which is why I say, they're only interested in the mental impressions. If the discussions do not reveal or reflect what a party thinks about this case, they don't want them. That's their whole theory of relevance here, which is why I think the Magistrate Judge said, that's what sounds like what you want is work product. You, 10X, have to show waiver of work product and you can't do that because the parties were talking under a nondisclosure agreement and there is no risk that that information would get to 10X. And you can do that just based on the waiver rules around work product without even delving into, you know, Hewlett-Packard and the common interest body of case law. It's just independent grounds of affirmance.

And I do not think --

THE COURT: So let me just ask you this. Let's say Bio-Rad at the last minute said, we're not doing this deal and, or let's say Celsee said we're not doing it and then Bio-Rad sued Celsee. Are you telling me that those negotiations, they would never see the light of day in a Court if there was a dispute over the meaning or, you know,

the way the negotiations went?

MR. YOUNKIN: I don't know the answer to that question, Your Honor. I mean, I think it's possible in that situation that --

THE COURT: Well, it happens all the time. It happens all the time when there's a negotiation that doesn't get consummated or gets consummated and the parties argue about it. As long as parol evidence is admitted, if you have then an ambiguous contract or something, this is the kind of evidence that comes in under the parol evidence rule.

MR. YOUNKIN: Well, the parties -- the parties, of course, are free to waiver work product if they decide to in a litigation, and here, that's not being done. The parties are, you know, making their work product objection.

I also want to make just one point about it seems like Mr. McGowan is drawing this distinction between the documents in the data room, which he, I think, now concedes is off-the-table and communications that were made in a negotiation, but there's no reason to draw a distinction between those two things. It's just, it's just the form of communication.

And so if we all agree that if an opinion of counsel gets put into the data room and there's no waiver, then the same thing should apply if the contents of the

opinion of counsel are disclosed in an oral communication or an e-mail.

THE COURT: I don't think he said that and I don't need to rule on that because I've already said he doesn't get work product. He doesn't get work product because they took the position in footnote 3 that they weren't seeking it. All right.

So the only question is, do they get the communications that went back and forth between the parties. I mean, to me, I mean, I don't think it has huge probative value, but as you said, you didn't make that argument.

Now, the good question is, you know, they're making a new argument, you could argue, so can I just consider now, like what's the relevance of this material? What would be the burden to produce it? But you have not said anything in that regard even though I've asked.

MR. YOUNKIN: Well, I mean, I think that I mean I would point to the footnote that we make in the response to the objection, and I would also say that the circumstances have changed a bit because, you know, where we find ourselves right now is November 5th, the plaintiffs served an opening damages report, so we already have their expert opinion on what she thinks the damages in this case should be, and we're about to serve our rebuttal report on Friday, tomorrow.

And then what they want to do is have a deposition in the next couple of weeks, I guess, that they think is going to uncover evidence that's going to bear on damages, and so then what are we going to do? Supplemental reports, you know, as we head towards summary judgment in February?

I mean, just from a practical standpoint, you know, it's going to be difficult. Like I said --

THE COURT: Have you considered what kind of burden it would take to go review all the different e-mails and communications between 10X and Bio-Rad? You didn't log the material. Right? Have you even conducted a search for the material?

MR. YOUNKIN: I don't, I don't know the answer to that question. You know, these requests, the requests for the Bio-Rad discussions in particular came in pretty late in discovery. We objected to them. There was a little bit of hashing things out. But I mean I think that we have been pretty clear that we weren't going to produce these communications, you know, going way back.

And, really, I mean, the issue really got teed up around this, the deposition as opposed to responses to document requests. But like I said, Your Honor, I think that we still have to address this issue of we all agree that they're not entitled to work product information, but I

think it still leaves open a question, well, what is work product information? And Judge Fallon said, communications about this litigation are covered by the work product doctrine, and that conclusion, we submit, is not clearly erroneous, and 10X has not shown that it was.

They are not asking for communications about, you know, some random provision in this merger agreement. They are asking for communications about the litigation. That's all they care about.

THE COURT: Well, there was no work product objection lodged to the 30(b)(6) witness. Right? It was based solely on the objection on the common interest exception.

MR. YOUNKIN: But the common interest exception, I mean, I don't think that's mutually exclusive of work product. Really, what the common interest exception is saying, the underlying privilege was not waived. And, by the way, the LaPointe deposition happened first, and so they understood kind of what our position was, I think, and if they had any questions about it, they could approach further with Mr. Stark, the witness who is actually involved in the negotiation, and they didn't.

And so they asked him specific questions. You know, what were the considerations that led to this escrow provision? And I was there and I objected to work product

grounds. And as I think you said, it really couldn't have been clearer.

And then in the meet-and-confer, which Mr. McGowan didn't attend, work product was featured. I mean, I was telling Mr. Novikov that I thought that work product prevented him from getting this information. And so they understood this was an issue, which is why they dropped a footnote to address it briefly in their letter.

And then when we got to the argument, Mr. Novikov opened up by arguing that communications about this negotiation, about the negotiation of this merger agreement are not covered by the work product doctrine.

So that was aired, and the Magistrate Judge disagreed and said, no, that those communications are covered by the work product doctrine.

THE COURT: So why don't you explain to me why communications with another party that's trying to buy, is interested in purchasing your stock, why would my communications with that entity constitute work product?

MR. YOUNKIN: Because the content of the communication is a mental impression about the litigation, and so just as a side note here, the deal is being characterized as a stock deal. I mean, this is an acquisition. Right? Bio-Rad bought it. They own it now. It's not just they bought ten percent of the shares or

anything like that. Bio-Rad purchased, acquired, 100 percent of Celsee.

THE COURT: Okay.

MR. YOUNKIN: But so if there's a negotiation happening and under an NDA where a defendant in a lawsuit is talking about somebody who wants to buy them and the defendant says to the potential acquirer, let me tell you my mental impressions about this litigation, okay. So what is being communicated is a mental impression that had been formed in connection with the litigation.

And the disclosure of that mental impression to the other side is not a waiver in the same way that, you know, if you had -- you know, a general counsel sits down and says something like, you know, here are the defenses to this, to this claim, here are the arguments that I think, you know, are good ones that we're making, those are his or her mental impressions. And if you disclose that to a potential acquirer under an NDA, under the very strict rules surrounding waiver, which they had the burden to prove, there is no waiver, and that's what Judge Fallon held and she was correct.

THE COURT: Well, I'm having a hard time. You know, you cite 26(b)(3)(A). I mean, that deals with documents and tangible things. So, A, that is off the table. We're not talking about that. We're talking about

conversations, number one, and then we're talking about e-mails that are sent to Bio-Rad. They are not in anticipation of litigation. I mean, you've got to demonstrate to me why they would be.

I get where it may be within those documents they are conveying what 10X's lawyers thought about the case and they are not getting that. We've already discussed that. So I want us to go back and narrow the scope of what is really being addressed.

Now, I do think it's, you know, it's informative that they are buying all the stock, so they are taking over, they're basically taking over the case, and they are, is it fair to say then they are at least indirectly inheriting the liability in the litigation in your view?

MR. YOUNKIN: I mean, subject to the terms of the merger, which address this.

THE COURT: Okay. What does it address? What does it say?

MR. YOUNKIN: Well, there are -- I mean, there are --

THE COURT: Actually, what does the letter of intent say? Let's focus on that, about what happened to the litigation.

MR. YOUNKIN: The letter of intent says that Bio-Rad will acquire a hundred percent of Celsee, and then

it goes through some of the money payments. I do not believe that it talks about -- you know, then it says we're going to do due diligence and it doesn't mention the litigation, I don't think, just looking at it quickly, expressly.

The merger agreements does contain provisions that squarely address the litigation, including how it's going to be paid for, and those are, those are the provisions that 10X wants discovery on.

But, again, if you have -- let's just say you have two businesspeople sitting across the table from each other and one businessperson says, as Mr. McGowan asked, how worried should we be? How could that question possibly be answered without revealing the attorney's mental impression?

THE COURT: Very easily. You just don't disclose what your attorney said to you or wrote to you.

MR. YOUNKIN: But the negotiators, the negotiators's view on that is inextricably tied to what his lawyers are telling him. A businessperson is not an independent view of the potential liability separate and apart from information that has been given to him by lawyers. No way is he forming a judgment about that.

THE COURT: Well, I don't find that argument very compelling.

So, Mr. McGowan, here's where I am. It just

strikes me that I don't see how I would let into evidence in front of a jury any statements that were made during the course of the negotiations, because I think if I applied Rule 403, I would conclude that the probative value here would be substantially outweighed by a number of considerations. I think it would confuse the jury and potentially mislead the jury because I don't think any of the statements that might have been made during the negotiation with respect to the value of the litigation or potential damages award, I don't think that it would be -- it would be fair or proper to have the jury try to parse, well, how much of that is based on things that the jury should never think about, some of the legal strategies and assessments about juries, about judges. I just think it would -- and I think the probative value is limited.

Now, I have not heard anything about burden from 10X, but I really just question why we need to have teed up --

MR. McGOWAN: May I respond, Your Honor?

THE COURT: Yes. Sorry. I was hoping you would. Thanks.

MR. McGOWAN: I just wasn't sure if the Court was concluded.

Let me suggest that a 403 ruling usually has the benefit of the proffered testimony, so there's something

concrete to rule on. Part of the discussion we've just been having is hypothesizing what the testimony might be, and if Bio-Rad comes in and makes its own statement, that's what we've looked at. Says, yes, we've got a problem there. It feels very different from the kind of hypotheses that 10X's counsel was just making.

I think the way to cut through all of this is to actually adduce the testimony respecting the Court's work product, the way the Court has ruled, but the Court I think is correct, that that is not everything. And I agree that back and forth across the table in a merger in a hundred percent stock acquisition, I don't think that makes a difference in the common interest doctrine. But I think that kind of evidence comes in all the time. I don't think there's a plausible work product decision there.

So I think the way to cut through this is to respect the Court's ruling that it has made on work product, recognized that there was some residuum, then find out what it is and then have a concrete piece of testimony or a concrete question that can be addressed. That's what I would suggest.

I feel as though making assumptions about what might be the case is not a good way to resolve the question of admissibility or a question of burden when that hasn't really even been briefed.

And --

THE COURT: Well, I said, I used the conditional language when I said it, and I said it with the hope that you might think the odds of it coming in are so minimal, that you wouldn't pursue it. But you are not willing to do that, and I'm not making a definitive 403 judgment because I don't have something specific in front of me. I was just sharing with you my general thought process based on your explanation of how this information you hoped to get would be probative. It is just I didn't find it really, really compelling.

MR. McGOWAN: Sure. If I can just -- let me just -- I don't want to dwell too much in hypotheticals, but the Court alluded earlier to the idea that, well, maybe Bio-Rad makes a comment that is not -- and a Celsee person agree with it.

THE COURT: Wait. You broke off again. You said Bio-Rad makes a comment and then I lost you.

MR. McGOWAN: And then a Celsee person agrees with it and says, yes, that's true. That could be a liability issue, not a damages issue. That's a response to a comment. That's not work product in any respect.

Now, what the Court would do with that, would think about that in a 403 context would depend, I think, on the question, and the Court would have something concrete to

look at. But I really feel as though with respect to the Magistrate's ruling, that the premise that the non-mental impressions across the table testimony is not work product, I think that's a matter of law. I don't think there was any foundation laid to show that it's work product and I don't think there has been any laid here.

So I think that ruling was incorrect with respect to the traunch of communications the Court has identified this morning.

Then the question becomes, if I take the Court's point to be is the game worth the candle with respect to that bit of information. We're looking at a June trial date. I don't think this -- I have not heard a reason why this should take a huge amount of time, but I think that in order to follow the legal rules of work product and admissibility, we really need to see what the evidence is so concrete decisions can be made.

MR. YOUNKIN: If I can respond to that?

THE COURT: Yes. Sure. Go ahead.

MR. YOUNKIN: I mean, you know, Courts make relevance calls all the time before we know what the answer is. That's what -- I mean, when you are ruling on a motion to compel a document request, the question is, you know, what is the question? What are the documents you are seeking and are those relevant? Can you show that they're

relevant?

And, you know, and prejudice and burden can play a role in that as well. I mean, here, we're here on a motion to compel answers to questions that were asked at a deposition. This shouldn't be, you know, open up, have a whole deposition. They should come in here and say, point to the transcript. Here's the question I asked. It was blocked. I would like an answer to that question.

And I don't think that Mr. McGowan can point to any questions that were asked where, you know, he feels like he needs the answer in order to make an argument that, you know, that passes 403 muster.

MR. McGOWAN: May I respond, Your Honor?

THE COURT: Sure.

MR. McGOWAN: The instruction given in Exhibit G, the corporate deposition, was a categorical instruction.

MR. YOUNKIN: That issue has been waived. I mean, what they asked Magistrate Judge Fallon for was a deposition of Mr. Stark. They did not ask for a new 30(b)(6). They didn't ask for Mr. LaPointe to reappear. They said, this is in --

THE COURT: All right. So, hold on. This is the first, you know, that somebody has said that to me. Maybe it's in the papers, but this is -- again, I go back

to, it just wasn't really presented, at least something that I would grasp immediately. So hold on.

So the pending motion is solely to redepose Mr. Stark. Is that right?

MR. YOUNKIN: Yes. Footnote 1 in their letter brief to the Magistrate Judge.

THE COURT: All right. Hold up. Well, this is made in the context of another argument.

MR. YOUNKIN: Well, the proposed order is to produce Mr. Stark to provide deposition testimony as a corporate representative. I mean, Mr. Stark wasn't our corporate representative on any topic. He is a former employee.

THE COURT: Okay. So, you know, now I'm looking at it, it does say, Celsee should be compelled to reproduce Mr. Stark to testify as its corporate representative concerning the negotiation of the merger agreement. I mean, that's a 30(b)(6) witness. They want Mr. Stark to be the witness because they think he's probably most knowledgeable, but I mean, they're asking for a 30(b)(6) witness. They just want it to be Mr. Stark. That's on page 3 of your letter, DI 204. I don't think they've waived their right to have a 30(b)(6) witness given that language.

Okay. Anything else anybody wants to bring to my attention?

MR. YOUNKIN: I mean, we've been going for awhile, Your Honor, so I don't want to belabor the point. I will just say though that I think you have really focused on this one prong of the Magistrate Judge's decision, which I think is fully sufficient to affirm, which is the no waiver of work product, but there is a separate and independent ground around the common interest doctrine, and I think that what, you know, what 10X is trying to do here, you know, and I think that they've been pretty candid about it, is basically get this Court to rule for the first time in Delaware at the Third Circuit that you cannot have a common interest when you're in merger talks. A common interest doctrine simply doesn't apply there.

THE COURT: No. So I don't view it that broadly. I mean, frankly, I would prefer not to opine, period, because I don't think -- because of the manner in which the issues were brought to me and brought to the Magistrate. But I don't think they're asking for as broad a ruling as you just said. Am I correct?

MR. YOUNKIN: At the hearing they told the Magistrate Judge -- I mean, their position is that Hewlett-Packard was wrongly decided and that it should no longer be followed. And the Magistrate Judge says, well, if I agree with you, is this going to (inaudible) privilege whenever there's a merger?

And they candidly said, yes, they would like the District of Delaware to say that Hewlett-Packard was wrongly decided and it's not the law in Delaware. And so that when parties -- and they would like the Court to follow, you know, other cases, like out of Illinois that say that when parties are in a merger negotiation, there's no common interest.

It's just not the law in the Third Circuit. I mean, the Sealed Air case rejected that, rejected that argument squarely and then there's a Bankruptcy Court in Delaware that did the same.

And so I think that they are candidly saying that they would like, that they would like Your Honor to rule that Hewlett-Packard is not the law of Delaware and that that line of cases --

THE COURT: First of all, when you say that the law -- so actually, this gives me a perfect example. In fact, I'm glad. I forgot to raise this and I really should have at the outset, but it's a perfect example of why I mean this is not teed up for me. And let me ask Mr. McGowan first.

Mr. McGowan, are you there?

MR. McGOWAN: I'm here.

THE COURT: So what law of privilege should guide, should I follow?

MR. McGOWAN: To the extent that -- Rule 26 is the answer to the Court's question. To the extent the common interest doctrine has been recognized and we're dealing with a federal question case, then I think on work product, it's always Rule 26.

THE COURT: Wait, wait, wait. So hold on. We're not dealing with work product. I already ruled on work product.

MR. McGOWAN: Right.

THE COURT: So we are only dealing with privilege. All right? So what rule applies?

MR. McGOWAN: Okay. I apologize. When the Court said privilege, so the rules that the Court would be bound by I believe would be Third Circuit.

The rule --

THE COURT: When you say -- wait. When you say rule of the Third Circuit, so when the Third Circuit addresses a privilege, doesn't it look to the state law, the state law privilege that's relevant?

MR. YOUNKIN: So it depends on the basis for jurisdiction in my view, Your Honor.

So in a diversity case, for example, attorney/client privilege with respect to causes of action grounded in state law would be governed by state law. With respect to work product, state law is not relevant because

it's a rule of civil procedure, and under the Erie doctrine, the Federal Rules govern.

THE COURT: But we're not dealing with work product. Right? I only have a brain, I've got a limited brain. I'm not as smart as you guys. The reason why I'm bringing up work product, I lose track of things. I'm only interested in this issue and no one briefed this.

So let help out again with --

MR. YOUNKIN: Sure.

THE COURT: -- when I'm making a privilege call in a patent case in the Third Circuit, does it matter whether the lawyers are from one jurisdiction or another? Does it matter -- you tell me. How do I figure out, because the states have different views about what's privileged or not. Correct?

MR. YOUNKIN: I agree with that, Your Honor, and I don't want to repeat the Rule 26 phrase if I can call it that because I don't want to sidetrack this discussion.

The common interest doctrine is not an independent privilege. It is an anti-waiver rule. So if the question is how does the common interest doctrine relate to some underlying privilege against disclosure, then the answer to what law the Court looks to depends on the basis of jurisdiction. In a patent case, we don't need to worry about that. It's a federal question.

The common interest doctrine is largely federal common law, which I understand is not supposed to exist, the Erie case, but it has been absorbed out of the criminal cases starting with joint defense and it has now become a case law doctrine.

So the answer to the Court's question, the exception is a federal case law exception, the underlying privileges or protections against disclosure are Rule 26 in this case, because I don't believe there has been an attorney/client privilege argument in this case and we can set that aside.

You were correct, if it were attorney/client privilege, then you would have to look to see if it's diversity or federal question, then federal question would be under the rules and would probably absorb common law of the state in which the communication was made, but that's not important to the Court's decision here, I don't think.

THE COURT: What --

MR. McGOWAN: So if I can --

THE COURT: Go ahead.

MR. McGOWAN: So if I can respond on the common interest question, I don't think that we're asking for a ruling of the breadth that counsel just described and I also don't think the Hewlett-Packard case is the font of all knowledge.

This Court, the District of Delaware, established the rule applied in Hewlett-Packard in the Union Carbide case with reference to protective shield in cases such as co-defendants or anticipated joint litigation.

Hewlett-Packard has a broad policy discussion of how important it is for business deals to get done, but its very specific holding tracked the Union Carbide case. And in the Hewlett-Packard case, the issue was sale of a division where the seller had been practicing the patent for the sale and the buyer was going to practice after the sale, so in all likelihood they would have wound up on the same caption as defendants with respect to different periods of time.

The Sealed Air case, when it goes back to Hewlett-Packard and reads it, also applied the joint litigation test that goes back to this Court's 1985 ruling in Union Carbide.

And our point is then the Sealed Air case is a successor liability case. It's a little unusual because the parties were worried that the transaction itself was going to be a fraudulent transfer of assets, but the Court made very clear that the liability of the seller and the buyer was the same liability.

So using the Union Carbide rule and its whole

stars of co-defendants for joint litigation, that's what the case is recognizing a common interest against Lozier turned on.

The reason I mentioned the stock acquisition is acquiring even a hundred percent of the stock of a company doesn't really matter, doesn't put the buyer on the same caption. It gives it an economic interest in the company whose assets it holds, but I've not heard Celsee suggest that Celsee has been merged into Bio-Rad so that it's now Bio-Rad. I haven't heard it suggested that it's no longer a standalone company. What has been suggested I believe is that its stock is now owned by somebody else. That's not Hewlett-Packard, Sealed Air, and it's not the Union Carbide test.

So I don't think that there needs to be any broad ruling or very general statement about the common interest doctrine. If we just follow the actual facts and holdings of the cases and bring it back to its origin, I think that that doctrine doesn't apply in this circumstance.

THE COURT: Okay.

MR. YOUNKIN: If I may, Your Honor, I need to point out --

THE COURT: No. Go ahead. I think that the challenge for you is that Union Carbide addressed a situation where there was, where both parties were likely to

be involved in what the Court called "anticipated joint litigation," and we don't have that here, do we?

MR. YOUNKIN: Well, what we have here is a company that is the -- that now owns, 100 percent owns a party to litigation. And I don't think that there's anything in the case law that suggests that this question turns on whether or not post acquisition the acquiring company is going to be added as a named defendant in the case. I think that that is a much too narrow reading of these cases and it's not what they argued.

I mean, what they argued to the Judge, to Magistrate Judge Fallon, was Courts have widely rejected the contention that a company and a potential purchaser who sat on opposite sides of the bargaining table share a commonly owned interest in contemplated or pending legal proceedings. That was the argument they presented to her, and she said, that's not correct. That's not correct under Sealed Air. It's contrary to AgroFresh and it's contrary to the Hewlett-Packard line of cases.

The cases that they cite are completely different from our case. They cite a case where somebody was going to buy a majority share of a company, just a majority share, but that's just an investment.

When you buy 51 percent of a company, you might have an economic interest, but that is completely different

from owning the company. You know, owning 100 percent of it. It's a subsidiary at that point. Right?

And --

THE COURT: Yes, but I mean --

MR. YOUNKIN: The way the deal was structured --

THE COURT: Have you read Judge Chen's opinion in Nidec? I mean, he really braces the history of the common interest privilege, and one thing he points out is that the parties have to have a joint legal interest and we don't have that here. Right? There there's no joint legal interest, is there? It's economic.

MR. YOUNKIN: Well, I think it's the same interest you see in Sealed Air or you see in Hewlett-Packard.

Nidec, all that was happening in Nidec was --

THE COURT: You know, you keep saying Hewlett-Packard, and you say, oh, it's binding in Delaware. I mean, Judge Chen didn't go with Hewlett-Packard. Right?

MR. YOUNKIN: I'm not suggesting --

THE COURT: A Delaware case, which is Union Carbide, but even it's not binding. You know, why --

MR. YOUNKIN: I agree with you, Your Honor.

THE COURT: Yes. Why should I give more to Hewlett-Packard that I give to Nidec?

MR. YOUNKIN: Well, I think for two reasons.

One, I think that Nidec is distinguishable because there, you have a situation where an investment group is trying to buy the majority stake of a company. They are not going to own it. That's number one.

Number two, Hewlett-Packard has been -- has been followed in the Sealed Air case out of New Jersey, and also, you know, we think that it is the correct, it's the correct decision.

But, you know, as I think we've been talking about, I mean, what they tried to do in a very short letter brief to the Magistrate Judge was get a ruling, and the transcript is crystal clear on this. The Magistrate says, the Magistrate asked them, if I find in your favor, won't that mean that there's no common interest when there's merger discussions? And the answer was, yes, I think that's right.

And the Magistrate Judge said, I don't think that is the law. And it's their burden now to come in and say that she, that she, like, misapplies binding precedent.

And then they point to Nidec, which is a factually distinguishable case out of the Northern District of California.

THE COURT: All right. Anything else?

MR. McGOWAN: I could comment further if the Court wishes it.

THE COURT: No. You know, I had hoped this argument would make it unnecessary for me to have to address the legal issue, but I guess it doesn't look like I'm going to be able to do that, and, frankly, it's going to take me a little bit of time.

What I would like is, I'm going to give you chance by next Wednesday to file a letter no more than 750 words to address what is the applicable law of privilege to make the decision. You know, Mr. McGowan, you can answer orally that question, but I think I wouldn't mind seeing both parties respond to that.

Whether I might look to state law, federal law, federal common law and also just to lay out how I make that decision, what's a starting point for that decision, and then what is the applicable privilege law and common interest law. All right?

MR. YOUNKIN: You want both parties to submit on the same day, Your Honor?

THE COURT: Yes. Why don't you do Wednesday at noon, so you both have to do it at the same time. You know, I think the unfortunate thing about this is, you know, you guys have to keep going with the calendar here and I'm just bothered because I still continue to think at the end of the day, I doubt this has really much probative value and, you know, I've got to spend -- we just have limited resources

and the cases are, I don't want to take the case off the track its on as far as proceeding to trial in June, but we'll just have to do what we do.

All right. Anything else from the plaintiff?

MR. McGOWAN: No. Thank you, Your Honor.

THE COURT: All right. Anything from the defendant?

MR. YOUNKIN: No, Your Honor. Thank you.

THE COURT: Thanks, everybody. Bye-bye.

(Telephone conference concluded at 11:14 a.m.)

- - -

D

Q

R

EXHIBIT C

FILED UNDER SEAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

10x GENOMICS, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 19-862-CFC-SRF
v.	)	
	)	**FILED UNDER SEAL**
CELSEE, INC.,	)	
	)	
Defendant.	)	
	)	

DECLARATION OF CHRISTIAN LAPOINTE
IN SUPPORT OF MOTION TO SEAL

I, Christian LaPointe, if called upon as a witness could competently testify to the facts set forth below:

1. From August 2019 to March 2020, I served (part-time) as General Counsel for Celsee, Inc. ("Celsee"). After Celsee was acquired by Bio-Rad Laboratories, Inc. ("Bio-Rad") in April 2020, I continued to serve as (part-time) in-house counsel, under a contract with Bio-Rad, to provide legal services for Celsee in this litigation.

2. The agreement by which Bio-Rad acquired Celsee includes an escrow provision. The acquisition agreement, and the escrow provision contained therein, have not been made public.

3. [redacted]

[redacted].

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 20, 2020 at Boston, Massachusetts.

Dated: November 20, 2020

/s/ *Christian LaPointe*
Christian LaPointe

EXHIBIT D

FILED UNDER SEAL

REDACTED